



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIVASHA**

**(CORAM: R. MWONGO, J.)**

**CIVIL APPEAL NO. 108 OF 2015**

**KENYA NUT CO. LTD.....APPELLANT**

**-VS-**

**DAVID WAFULA WECHILI.....RESPONDENT**

*(Being an Appeal from the Judgment and Decree of the Honourable P. Gesora (CM) delivered on the 26<sup>th</sup> October, 2015 in Naivasha CMCC No 807 of 2012)*

**JUDGMENT**

1. The Plaintiff/Respondent, according to his Complaint was injured in an accident whilst in the employment of the Appellant on 19<sup>th</sup> May, 2017. He blamed the Defendant and filed a suit alleging that he was weeding in the Defendant's farm and he fell into a hole.
2. The injuries pleaded in the complaint were:
  - a) Deep cut on the left index finger measuring 2cm x 1cm.
  - b) Dislocation of the right hand.
  - c) Soft tissue injuries on the left hand.
3. After hearing the parties the Trial Magistrate found liability against the Defendant at 100% and awarded general damages of Kshs 250,000/= and special damages of Kshs 5,000/= making a total of Kshs 255,000/=.
4. The Appellant appeals against the award on the grounds that the Trial Court misdirected itself as to the exact nature of the Respondent's injuries and therefore erred in the assessment of damages awarded.
5. In the words contained in the Appellant's submissions:

***“The main bone of contention in this appeal whether or not the Plaintiff/Respondent suffered dislocation injury to the Right Hand.”***

The Plaintiff contends his hand was dislocated and the Defendant denies the dislocation, thus the award.

6. The only evidence adduced in this matter in the lower court was by PW1 Dr. Obed Omuyoma and PW2; the Plaintiff/Respondent. No evidence was availed by the Defendant/Appellant.
7. The Plaintiff testified that on 19<sup>th</sup> May 2007, he fell down into a hole whilst at work in the Defendant's macadamia farm and sustained the aforesaid injuries. In his witness statement the date of the accident is indicated as 4<sup>th</sup> October 2007. The statement merely states that he fell down, and the particulars in the complaint indicate that he was not availed gum boots to prevent or protect him from sliding and falling.
8. In cross-examination he stated that he fell into a hole, and that previously he had been injured in the middle and ring fingers when sharpening a hoe which cut him.

9. Dr. Omuyoma examined the Respondent on 21<sup>st</sup> June, 2012. He testified that the Respondent sustained the said injuries which had healed. He produced his report dated five years after the injury. He admitted in cross-examination that: one cannot tell the age of the injuries; that *“there is no suggestion that the Plaintiff had a dislocated (sic) of the waist (sic) from the card.”* He relied on an injury form from the Defendant which was not a medical document. He also relied on treatment notes from Naivasha District Hospital.

10. In my view and in light of the contradictions in the evidence, the treatment notes from Naivasha District Hospital are more reliable for the correct picture of the injuries sustained. The treatment notes are listed in the Plaintiff’s List of documents. In the Lower Court file the notes are marked as (MFI 6) and Exhibit 6.

11. The treatment notes dated 20<sup>th</sup> May, 2007 show the injuries to be:

“Cut on index finger left upper limb measuring 2cm x 1cm.....

Local exam

- Deep cut, bleeding.
- No foreign body.
- The wound is fresh.....

X-ray left index finger

X-ray reports

- No #
- STI (Soft tissue Injury), Deep cut

Plan

- Suturing
- Diclofenac 50mg
- Amoxilin/Cloxacin tabs
- TCA of 3/7”

12. From the treatment notes there is no evidence of dislocation. The medical plan did not feature anything related to a dislocation. Indeed, there is no injury at all noted in respect of the right hand. This is consonant with the cross-examination of Dr. Omuyoma where he said:-

***“There is no suggestion that the Plaintiff had a dislocated of the waist (sic wrist?) from the card. I relied on the injury from the Defendant.”***

13. The Employee Injury Report form marked Exhibit 4 shows the Plaintiff’s injury as:

***“.....Date 19<sup>th</sup> May, 2007 Dislocation right hand”***

The form is admittedly not a medical report and was produced by Plaintiff. This form does not even contain the deep cut injuries on the left finger shown in the treatment notes, and is therefore wholly unreliable.”

14. In the circumstances I find that the injuries shown on the treatment notes are the only injuries for which the Plaintiff was entitled to claim. They are:

***“Deep cut on index finger left upper limb measuring 2cm x 1cm.”***

15. The Respondent’s submissions were to the effect that liability is not contested; that the court should not interfere with damages unless it is demonstrated that the trial court applied wrong principles or awarded the damages which are manifestly high; and that the appeal lacks merit.

16. The Appellant submitted, relying on **Ndolo v Ndolo [1995] LLR 39 (CAK)** what the Court of Appeal said:

***“.....It is still the duty of the trial court to decide whether or not it believes the expert and gives reasons for its decisions. A***

*court cannot simply say: 'Because this is the evidence of an expert, I believe'.*"

17. Based on the assessment of the evidence I have done above, I accept the injuries as shown in the treatment notes: Soft tissue injuries and deep cut injury on left index finger.

18. The Appellant relied on the following cases on damages:

**Sokoro Saw Mills Limited v Grace Nduta Ndung'u [2006] eKLR** where the court reduced the award for soft tissue injuries from Kshs 80,000/= to Kshs 30,000/=;

**Kreative Roses Limited v Olpher Kerubo Osumo [2014] eKLR** where the injuries were a cut wound with permanent scar on right leg and soft tissue injuries on right leg, the trial court's award of Kshs 50,000/= was upheld.

19. I am persuaded that the injuries in **Kreative Roses** to be fairly comparable to the injuries in the present case. I would adopt an award underpinned on similar basis.

#### **Disposition**

20. In view of the foregoing, the appeal succeeds and the judgment of the Lower Court is set aside. The award for general damages shall be Kshs 80,000/= taking into account inflation. The award for special damages was not challenged and remains as awarded.

21. The cost of the appeal follow the event.

#### **Administrative directions**

22. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Zoom tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

23. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

24. Orders accordingly.

**Dated and Delivered in Nairobi by teleconference this 21<sup>st</sup> Day of October 2020**

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**R. MWONGO**

**JUDGE**

Attendance list at video/teleconference:

1. .... for the Appellant
2. .... for the Respondent
3. Court Clerk - Quinter Ogutu