



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 208 OF 2011**

**ELDORET STEEL MILLS LTD ..... APPELLANT**

**VERSUS**

**ELIZAPHAN OMBOGA ..... RESPONDENT**

*(Being an Appeal from the Judgment of the Resident Magistrate Honourable I. Maisiba in Eldoret CMCC No. 721 of 2009, dated 28<sup>th</sup> November, 2011)*

**JUDGMENT**

**INTRODUCTION**

The appellant sued the respondent in the lower court averring that he was an employee with the appellant company. He was at work when he slipped and fell on steel metal due to the negligence and carelessness of the defendant, its servant and as a result he sustained severe bodily injuries. The appellant denied the allegation that they were negligent and sought to rely on the doctrine of *volenti non fit injuria*.

The matter proceeded to hearing and judgment was entered for

Ksh150,000/= as general damages for pain, suffering and loss of amenities, and ksh 1,500 as costs plus interest of the suit. The appellant was dissatisfied with the judgment and hence he appealed. He raised 8 grounds of appeal as follows;

- 1. That the learned trial magistrate erred in law and in fact in holding that the appellant herein was negligent without any proof and/or evidence in that regard to support the court's decision.*
- 2. That the learned trial magistrate erred in law and fact in failing to consider the pleadings, evidence and submissions.*
- 3. That the learned trial magistrate erred in law and fact in failing to hold that the said accident was wholly and/or substantially caused by the respondent as a result of his own negligence by failing to exercise care when running as a result of which he slipped and fell.*
- 4. Without prejudice to the foregoing, the learned trial magistrate erred in law and fact in failing to take into account the fact that the appellant failed to wear gloves which had been provided and that if he had worn the gloves, he would not have been injured.*
- 5. That the learned trial magistrate erred in law and fact in failing to hold that the appellant was neither negligent nor in breach of contract or in breach of statutory duty.*
- 6. That the learned trial magistrate erred in law and in fact in failing to raise, consider and determine all the issues in the pleadings, evidence and submissions contrary to the provisions of the civil procedure rules.*
- 7. That the learned trial magistrate erred in law and fact in failing to hold that the respondent did not discharge his burden of proof as envisaged under section 107, 108 and 109 of the Evidence Act, Cap 80.*
- 8. That the learned trial magistrate erred in law and fact in awarding damages that were manifestly excessive as to amount to an erroneous estimate of loss actually suffered by the respondent.*

**SUBMISSIONS**

**Appellant's submissions**

Ground 1-7 were argued as one ground and ground 8 on quantum separately. The court was urged that the respondent did not adduce evidence linking the appellant to the injuries, that there was an omission by

the appellant. See ***Statpack Industries v. James Mbithi Munyao [2005] eKLR***. He had a burden to discharge and the same could not be shifted to the appellant, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, as was held in ***Karuji & Anor v. Kabiya & 3 Ors [1987] KLR 347***.

Further the court disregarded the evidence by DW1 and DW2 especially the accident register (dex no. 1) which indicated that the respondent was not injured at work since no accident report was made, only 9 employees reported to work on 22/7/2007, the respondent being a supervisor was not among the people present at work.

On the contrary if at all the accident occurred, the respondent ought to have been careful. He had worked for 20 years for the appellant and he was a supervisor by then and had spent 5 years at the melting section. It was his duty to ensure the machines were in proper working condition and the metals if any were kept in a proper place.

The allegation by the respondent that he was not provided with protective apparels was false. He had been given protective apparel on 1<sup>st</sup> March 2007 and the accident had occurred on 22<sup>nd</sup> July 2007. The respondent had testified that the apparels had worn out and he had not been given gumboots. The injury was above the knee and there is no way the gumboots would have prevented the injury. He knew the risk of the job he was tasked with and he had to be cautious. In ***Purity Wambui Murithii v. Highlands Mineral Water Co. Ltd [2015] eKLR*** the Court of appeal emphasized the provisions of Section 13(1)(a) of the *Occupational Safety and Health Act, 2007* that where an accident occurs due to the negligence of the employee it would be unfair to hold the employer liable.

The appellant urged that since the respondent had healed, Ksh 80,000/= would be adequate compensation for the soft tissue injuries.

### **Respondent' submissions**

The court could only interfere with the finding of the lower court if it was based on no evidence, or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusions as was held in ***Isinya Roses Limited v. Zakayo Nyongesa (2016) eKLR***.

The respondent had proved breach of duty by the employer and that the injury had been caused by the breach. The appellant had failed to provide

protective gear which contributed to the injury as he was running for safety. See ***Mumias Sugar Co. Ltd v. Farm Industries limited (2016) eKLR***. The court was also referred to Section 53 of the *Factories & Other Places of work Act, Cap 514* (repealed which states as follows:

*“where in any factory workers are employed in any process involving exposure to wet or to any injurious or offensive substance, suitable protective clothing and appliances, including where necessary, suitable gloves, footwear, goggles and head coverings shall be provided and maintained for the use of such workers.”*

The respondent had proved his case against the appellant by testifying that he was working at the scrap metal section and the crane which was filled up with molten metal was moving up when it failed to brake and the molten metal started to spill causing him to run for his safety. The court did not err in finding that the appellant was 100% liable.

On quantum the respondent referred the court to the case of ***Butler v. Butler (1984) eKLR*** on the principles upon which a court can interfere with an award of damages. The award was reasonable.

The issues that arise for determination are:

1. Whether the appellant is liable for the injuries sustained by the respondent and if liable how much was adequate compensation.

This is the first appeal and this court is alive to the principles set out in ***Butler v. Butler*** of when an appellate court can interfere with the award of the lower court, as follows:-

- i. That the court acted on wrong principles
- ii. That the court has awarded so excessive or so little damages that no reasonable court would allow it to stand.
- iii. That the court has taken into consideration matters it ought not to have considered and as a result arrived at a wrong decision.

The appellant does not dispute the respondent was their employee and that on 22<sup>nd</sup> July 2017 he was on duty. He however disputes that the respondent was injured while at their place of work. The Respondent testified as

follows, “on 22<sup>nd</sup> July 2007 I was working in Eldoret Steel Mills as supervisor at the scrap metal section. The crane was moving up filled with molten metal. The crane failed to brake and the molten metal started spilling and as I dashed for safety from the molten metal, the scraps metal prevented me from running. I fell down and some scrap, metal cut me on my knees as I fell.”

The respondent shows that the metal scrap made him fall. The respondent however disputes that he was injured. DW1 *Elijah Wanjofu* testified that the respondent was on duty on 22<sup>nd</sup> July 2007 but he was supervising workers putting metals into the furnace. He was not sure if the respondent had been injured on that day. DW2 *Llion Timona Nganda* testified that the respondent had reported to work at 7.00 am and had worked till 2.00 p.m. He did not receive any injury report, only 9 people reported injuries on 22<sup>nd</sup> July, 2007 and his name is not on the list of the injured persons. The accident report (dex no. 1) shows the name of injured, the date of the injury, the place of the injury, how much one was given to seek treatment and the person who witnessed the injury. The appellant's witnesses did not tell the court in their evidence where they took the injured persons in case of injuries. They were silent on this.

As was held in *Purity Wambui Murithi v. Highlands Mineral Water Co. Ltd* (*supra*) the court opined that as a general rule the employer is liable for an injury or loss that occurs to his employees while at the work place as a result of the employer's failure to ensure their safety. The appellant's witnesses did not give evidence on how they ensured the place of work was safe.

In addition to this, the respondent had testified that the crane's brakes had failed, and as a result molten metal slipped on the floor and he got injured while running for his safety. No evidence on the contrary was adduced to rebut the claim. The respondent had the burden to prove on causation and a casual link as was held in *Statpack Industries v. James Mbithi Munyao* (*supra*) where the court held as follows:

***“It is trite law that the burden of proof of any fact or allegation is on the plaintiff. He must prove a casual link between someone's negligence and his injury. The plaintiff must adduce evidence from which on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily as a result of someone's negligence. An injury per se is not sufficient to hold someone liable.”***

Indeed the respondent had to show the injuries were as a result of breach of duty and care of the appellant. The respondent had testified that he was not provided with protective apparels. The appellant had tried to produce a protective issues book whose production was opposed. (N/B **The proceedings do not show if the same was allowed or declined**). The appellant did annex the same in the record of appeal.

The respondent pleaded to have sustained the following injuries

- I. The right knee was swollen and tender with a lacerated wound
- II. Severe pains incurred during and after the injury.

He testified to have been treated at Uasin Gishu District Hospital on 22<sup>nd</sup> July 2007, the document from this hospital and *Dr. Aluda's* report were produced by consent of both parties.

I do find that the respondent proved his case in the lower court on balance of probabilities. Given the sustained injuries the damages awarded were not excessive and there is therefore no cause to interfere with the lower court decision. The appeal therefore fails with costs to the Respondent.

**S. M GITHINJI**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 25<sup>th</sup> day of April 2019**

In the absence of:

Mr. Kipruto for the appellant

Mr. Njuguna for the respondent

And in the presence of Mr. Etyang – Court assistant