



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KIAMBU**

**CIVIL APPEAL NO. 28 OF 2017**

**SOCFINAF CO. LTD.....APPELLANT**

**VERSUS**

**BENARD KIFORO KELWA.....RESPONDENT**

(Being an appeal from the Judgment of the **Hon. Lorot RM** delivered on **11.01.2007** in Gatundu Civil Case No. 68 of 2004)

**JUDGMENT**

1. This appeal emanates from the judgment of **Lorot, RM** in **Gatundu Civil Case No. 685 of 2004**. In that case, the Respondent herein had sued his employer, the Appellant company, for damages, alleging that he had suffered injury while in the course of duty as a general worker at Tatu estate on 16th August 2002. He had averred that a leaked chemical from the Knapsack sprayer he was using in the course of his duty had occasioned him injury. He had pleaded negligence and breach of statutory duty against the Appellants, in that the said employer had *inter alia* failed to provide a safe and proper system of work and equipment and to provide suitable protective clothing and gear to the Respondent.
2. In an amended defence statement, the Appellants denied liability, the occurrence of the accident, and injury, negligence and breach of statutory duty. The Appellant averred that the Respondent had been furnished with full protective clothing including overalls, gumboots and gloves for purposes of his work.
3. The case proceeded to full hearing. In his judgment delivered on 11<sup>th</sup> January 2007, the trial magistrate found the Appellants 100% liable and awarded the Respondent general damages in the sum of KShs.200,000/= and special damages in the sum of KShs.1500/=.
4. Aggrieved with this outcome, the Appellants lodged this appeal, raising 14 grounds of appeal. The majority of the grounds attack the analysis of the evidence by the trial court and consequent findings. The Appellants also challenge the award of damages which they assert to be manifestly excessive. The appeal, originally filed at the Civil Division of the **High Court at Nairobi in 2007**, was delayed by the fact that the original lower court file was destroyed in a fire at the Gatundu subordinate court, necessitating reconstruction of the file. On 24/2/17 the appeal was transferred to this court.
5. The court gave directions on 16<sup>th</sup> October 2018 that the appeal be disposed of by way of written submissions. The Appellants submissions were filed on 19<sup>th</sup> November 2018, and though the Respondent had not complied with the directions by 26<sup>th</sup> November 2018 when this court scheduled a judgment date, he subsequently filed submissions on 13<sup>th</sup> February 2019.
6. The Appellants argued grounds 1, 2, 3, 4, 5 and 8 together, submitting as follows. The Appellants asserted that the Respondents oral evidence on the occurrence of the accident and consequent injuries was contradicted by the earliest treatments notes tendered by him and controverted by the evidence of company nurse **DW2**. Moreover that there was no evidence of burns from a chemical. The Appellants asserted that it was not possible that the injury from a leak in the Knapsack on the back of the Respondent could only be confined to his scrotum as he alleged, pointing out that there was no evidence of injury to the back or other part of his body. The Appellants fault the analysis and findings of the trial court that the Respondent was injured in the course of duty. They attack the credibility of the Respondent's evidence *vis-a-vis* that by defence witnesses.
7. In support of grounds 6, 7, 9, 10, 12 and 13, also argued together, the Appellants take issue with the fact that the cause of Respondent's alleged injury, namely chemical spillage, was not recorded in the earliest treatment notes or communicated to **DW3** but raised much later to the Respondent's doctor, **Dr. Kinuthia (PW2)**. They take issue with the trial court for dismissing out of hand, the testimony of **DW1**, and instead accepting the evidence of **PW2** which, according to them is not supported by the treatment notes. Finally with regard to ground 14, it is argued that there was no basis for an award of damages as the evidence tendered by the Respondent did not establish liability against the Appellants.

8. For his part, the Respondent submitted as follows. The appellate court does not interfere with findings of the trial court willy-nilly but in accordance with laid down considerations such as enunciated in **Jabane v Olenja [1986 – 1989] EA 183**. Reiterating the evidence of the Respondent at the trial, it was submitted that the accident in question on the material date i.e. 16<sup>th</sup> August 2002 was established, and that all the Appellant's attempted to do by raising issues of inconsistencies in the date is to support the biased evidence through the company nurse. Moreover, that the Respondent had denied in his evidence to have told the doctor who initially saw him that he had sustained injuries 3 days prior to going to the hospital. In the Respondent's view, the initial treatment notes are consistent with the findings of the doctor, **PW2** who prepared a report in that regard.

9. The Respondent takes issue with the evidence of the Appellant's doctor (**DW1**) which according to him is inconsistent with the initial treatment notes. The Respondent therefore defended the finding of liability against the Appellants, relying on the case of **Makala Mailu Mumende v Nyali Golf County Club [1901] KLR 13** and **Halsbury's Laws of England** regarding the duty of an employer to ensure reasonable care for the safety of employees. The Respondent also defends the award of damages and urges the court to dismiss the appeal.

10. The court has considered the evidence adduced at the trial and submissions made on this appeal by the respective parties. The duty of this court as a first appellate court is to re-evaluate the evidence and draw its own conclusions, but always bearing in mind that it did not have the opportunity to see or hear the witnesses testify. See **Peters v Sunday Post Limited (1958) EA 424**; **Sele and Another v Associated Motor Boat Co. Limited and Others (1968) EA 123**, **Williams Diamonds Limited v Brown (1970) EAI**.

11. The Court of Appeal in **Ephantus Mwangi and Another v Duncan Mwangi Wambugu (1982) – 88 IKAR 278** stated that:

**“A court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have altered on wrong principles in reaching the findings he did”**

12. There was no dispute at the trial that the Respondent was an employee of the Appellants and was on duty on 16.08.02. On the next day, he visited the company clinic, seeking treatment for a swollen scrotum and was referred to the local hospital at Kiambu. He was seen at the said hospital. He complained of swelling of the testes and pain. He was given a prescription which he returned to the Appellant's clinic and the drugs were procured.

13. The key issue arising out of this appeal is whether the Respondent's swelling to the scrotum/testes was as a result of coming into contact with spillage of chemical, as the Respondent used a spraying pump mounted on his back. There were two apparently conflicting medical reports, by Dr. Kinuthia (**PW2**) and Dr. Shah (**DW1**) as to the cause of the orchitis (inflammation of testicles) which the Respondent claimed to have been caused by the chemical spillage on his body.

14. First of all, the Respondent's evidence was that the sprayer on his back spilled contents of spray, that he notified his supervisor but was told to continue working, and only noticed swelling of the scrotum in the night. The Respondent admittedly did not notice any burns or inflammation of any other area nor feel any pain until he had gone home when he sensed pain in the scrotum. On the next day, he admittedly visited the company dispensary and complained of a swollen scrotum. He did not testify that he notified the attending nurse that the complaint was related to chemical spillage. The evidence by the nurse **Catherine Wanjiku Njoroge, DW2** as supported by records tendered at the trial as **DExh.4** confirm this and from the Respondent's own initial treatment notes produced as **Exh.1**, the complaint did not indicate a chemical related injury. The record indicates that urinalysis revealed pus cells.

15. Moreover the supervisor on the Appellant's farm who was on duty on 16.08.02 also testified. The witness **Joshua Abeka Kataka (DW3)** stated that the Respondent did not complain to him about any chemical spillage or injury on the material date. He asserted during cross-examination that he could not understand how an alleged leakage from the sprayer carried on the Respondent's back could have affected only his private parts. This common sense question exercised the minds of both Dr. Kinuthia (**PW2**) and Dr. Shah (**DW1**).

16. During cross-examination **PW2** had to concede that:

**“He (Respondent) said he was carrying the chemical container on his back. The contents spilt on him. He must have suffered dermatitis (burns) on the back but which would have healed when I carried out examination. He gave such history and it came ... my opinion Orchitis is an inflammation of the testis... can be caused by many things .... including exposure to chemicals, trauma, infection e.t.c also the history supported the occurrence. Orchitis can also be caused by TB and other bacterial infection.”**

17. **PW2** examined the Respondent over 1 year since the incident. His report including the patient's history is confined to the alleged injury on the scrotum due to exposure to chemicals. Although he claimed during cross-examination that the presence of pus cells in the urinalysis was indicative of an inflammation, **PW2** stated that depending on the concentration of chemical used for spraying (organo phosphate) the first reaction upon contact with skin is dermatitis (chemical burn or irritation of skin) but could also penetrate inner tissues. He however stated:

**“I saw patient 1 year and 3 months later. There were demonstrable scars but it does not mean there were no injuries.”**

18. **PW2** dismissed the medical report by **DW1**. Thus, neither of the initial treatment notes (by **DW2**) nor those at the Kiambu hospital indicate any dermatitis (burn or skin irritation) on any part of the Respondent's body, including the scrotum. Nor does **PW2's** report indicate that any such burns were experienced. According to **DW1** and indeed **PW2** the burns would have to be quite severe to penetrate the skin and affect the testis leading to injury. **DW1** and even **PW2** did not find any scars on the scrotum or surrounding region, or indeed any other part of the Respondent's body.

19. **DW1** during his evidence and in his report dismissed the claim that the Respondent had suffered any chemical injury leading to the swollen scrotum. He stated that chemical burns leave scars and mild acid would not cause major injury or burns that would leave scars. In re-examination he repeated a statement made in his evidence-in-chief saying that at most, the Respondent may have been exposed to mild acids.

20. I have looked at the medical report [DExh.2] by **DW1** made prior to reviewing the initial treatment notes and upon examining the Respondent. The doctor stated *inter alia* that he had not noted any abnormality on the scrotum, testis and thighs. He also opined that:-

**“His injuries must have been superficial inflammation of the skin of scrotum and upper part of thighs. Any severe injuries there would have left scars and there are no scars found on my examination. Any severe or deep injuries that would have cause effects on the testis and any hydrocol (collection of fluid in the sac covering the testis) would have almost certainly needed hospital admission ... such injury by a spray of chemical is extremely unlikely to affect testicles and to cause hydrocol”**

21. **DW1** prepared a further report (Dexh 3) with the advantage of the I initial treatment notes from Kiambu Hospital. He opined that:

**“Inflammation or infection or injury to testis can all cause some swelling and pain of testis ... the commonest causes ... Any chemical liquid which leads to swelling (or) inflammation of testis (orchitis) or hydrocol will have to be very strong acid or alkali which would first cause severe burns of the skin of the scrotum before it reaches the testis (which are quite deep in the scrotum). The (initial treatment notes from Kiambu Hospital) do not make any mention of any burns or abnormality of the skin of the scrotum... such severe burns will need hospital admission ..... treatment of such severe chemical burns will go on for at least 2 to 4 weeks... (not) just ... 2 medical consultations of 17.8.02 and 24.8.02.”**

22. Reiterating his earlier findings in DExh 2, the doctor concluded that

**“It is practically certain that he had no chemical sprayed or spilled on his scrotum and even if there was any chemical sprayed or spilled on his scrotum that must have caused a minor injury to skin or scrotum and nothing more. Any swelling or pain he had could be accounted for (by) ordinary infection or minor injury of the testing (sic) or scrotum” (sic)**

23. A post script to the report [D Exh 3] the doctor stated;

**“It should also be noted that there is no specialist report on this injury except for my report (I being a surgeon – a specialist in surgical condition, and scrotal and testis conditions are surgical conditions.”**

24. In his judgment, the trial magistrate having set out the rival evidence stated that:

**“I have considered both cases with a lot of care. The history of the Plaintiff is that he was spraying with a knapsack. The same leaked and he later saw his scrotum swell. There is corroboration that the first report received at the dispensary queried hydrocol. This is confirmed by documents from Kiambu (hospital) There was no way the Plaintiff would make up a chemical story over a venereal infection. On a balance of probabilities, I believe the Plaintiff is telling the ... truth. Doctor Shah the DW1 was in so much ... to dismiss the Plaintiff’s history and assertions that I find his opinion skewed and hopelessly one-sided”**

25. With respect, the judgment of the trial court does not contain any in-depth analysis of the evidence tendered by both sides, and in particular, the rival medical evidence. Nor did the learned magistrate give proper attention to the initial treatment notes and various causes of orchitis or hydrocol (collection of fluid in sac covering the testis), or the evidence by **DW3**. According to **PW2** and **DW1** hydrocol is a complication of the orchitis, or in other words a progression of orchitis (inflammation of testes).

26. With a deeper analysis, of the trial magistrate would have noted that both doctors agreed in principle that, if a chemical came into contact with skin, the first reaction would be the irritation or burns of the skin (dermatitis) and depending on the severity of the burns and based on the chemical concentration, there would follow a penetration into the inner tissues and further severe injury. The Respondent in this case sustained no burns on the back, where he allegedly carried the leaking sprayer or any area surrounding the scrotum, such as thighs or even his penis which he claimed had also come into contact with the leaked chemical substance. Nor was there any evidence even as at 17/8/02 that the skin covering the scrotum had any burns or inflammation. (see initial notes from Kiambu hospital). The question therefore is how the alleged chemical without harming the surrounding skin penetrated inner tissues to cause serious inflammation of the testis and possibly hydrocol.

27. The Respondent’s evidence did not add up. Rather than dismiss Dr. Shah’s report as skewed, the trial magistrate ought to have considered it alongside. **PW2**’s report as well as the initial treatment notes. Had he done so he would have concluded that there was no proven or probable causation in this case between the alleged injury and the stated cause (chemical exposure). And this is consistent with evidence by **DW3** that indeed the alleged chemical spill did not happen. If it had, the Respondent would have informed **DW3** on 16/8/02 or **DW2** on the next day as he sought treatment

28. Even if these witnesses were employees of the Appellants and probably more likely to lean in favor of their employer, the doctor who saw the Respondent at Kiambu Hospital was an independent person. Why did the Respondent not state to that doctor that his swollen scrotum was caused through chemical exposure? This would have been important information and no explanation was given for this omission by the Respondent.

29. I therefore agree with the Appellant's complaint that the trial court did not conduct a proper analysis of the evidence. The trial court's finding that the Respondent's condition was caused by chemical exposure, rather than other causes such as bacterial infection or trauma clearly had no basis as the evidence of causation defied basic logic, in addition to the fact that it was discredited by **DW1**, and impliedly by admissions made by **PW2** during his testimony.

Moreover, as to the occurrence of the alleged accident itself, the medical evidence by **DW2** and the testimony of **DW3** create serious doubt. The burden of proof in this case, on a balance of probabilities, was on the Respondent. In the circumstances of this case, the trial court erred in finding that such burden had been discharged. The Respondent's case upon a proper analysis did not muster the threshold of proof on a balance of probabilities. Indeed, it seems more believable, based on the entire evidence, that the Respondent's condition was caused by an infection and that the infection, rather than chemical exposure resulted in the swelling of the scrotum.

30. In the circumstances, the court finds that the appeal is merited and allows it in its entirety. The court sets aside the judgment of the lower court and substitutes therefor an order dismissing the Respondent's case. In light of the delay in perfecting and subsequent hearing of this appeal, I make an order that each party bears its own costs.

**DELIVERED AND SIGNED AT KIAMBU THIS 24<sup>th</sup> DAY OF OCTOBER 2019**

**C. MEOLI**

**JUDGE**

**In the presence of:**

Appellant – No appearance

Respondent – No appearance

Court Assistant - Kevin