



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 33 OF 2005**

**DWA ESTATE LIMITED.....APPELLANT**

**- V E R S U S -**

**FREDRICK MUSYOKA MULEI.....RESPONDENT**

*(Being an appeal from the judgement of the Senior Resident Magistrate at Nairobi (Milimani Commercial Courts) the Hon. Omondi (Ms.) delivered on 14<sup>th</sup> December 2004 in Civil Suit No. 1539 of 2002)*

**JUDGEMENT**

1. The respondent filed a suit via the plaint dated 17<sup>th</sup> January, 2002 for the benefit of the estate of Stephen Mulei Mukua, deceased. The respondent alleged that on 20<sup>th</sup> March, 1997, the deceased was working in the appellant's factory in the course of his employment when he was injured and succumbed to the injuries.

2. The appellant filed a defence on 9<sup>th</sup> May 2002 and amended on 21<sup>st</sup> May, 2002 denying the respondent's claims. The action proceeded for full trial and eventually the parties were found equally liable. The appellant being aggrieved with the judgement, lodged the appeal and raised the following grounds in its memorandum:

- 1. THAT the learned magistrate erred in law and fact in finding the appellant herein liable for the accident.**
- 2. THAT the learned magistrate erred in law and fact by failing to appreciate that the defendant's/appellant's evidence was of untenable veracity and accuracy.**
- 3. THAT the learned magistrate erred in law and fact by awarding shs.100,000 as general damages in part in favour of the plaintiff/respondent.**
- 4. THAT the learned magistrate erred in law and fact in relying upon the plaintiff's/respondent's witness uncorroborated evidence and statement that she was the sole witness to the plaintiff's alleged accident.**
- 5. THAT the learned magistrate erred in law and fact by failing to take into account that the entire plaintiff's suit was frivolous, vexatious and an abuse of the due process of the law and further, that it was improbable to be sustained against ea preponderance proof.**
- 6. THAT the learned magistrate erred in law and fact by delivering a judgment that was against the weight of evidence.**
- 7. THAT the learned magistrate erred in law and fact by doubting the defendant's evidence.**

3. When the appeal came up for hearing, learned counsels recorded a consent order to have the appeal disposed of by written submissions. I have re-evaluated the case that was before the trial court. I have also considered the rival written submissions. Though the appellant put forward 7 grounds of appeal, the same may be summarised to two main grounds namely: First a challenge over the decision on liability and second an appeal against quantum of damages.

4. The appellant submit that it is not sufficient to only show that the respondent suffered injuries but rather, it is upon the respondent to prove that those alleged injuries were occasioned by the appellant's negligence. That no iota of liability can be attributed to the appellant. Once liability has not been proved, it is simple to imply that the respondent failed to prove his case on a balance of probabilities. The appellant further stated that the employee is required to take reasonable precaution to ensure his/her safety at the work place while performing his/her duties.

5. The respondent submitted that it is not a worker's duty to ensure an employer's tool of work are safe for workers and thus it was wrong for court to apportion blame equally and proposed that the court finds the appellant to have been more at fault and hold it 80% to blame for the deceased's death.

6. PW1, a former employee of the appellant stated that the deceased was pushing bales of sisal products on a trolley and when he was about to stop on the wall, the trolley moved back and the bales of sisal hit him and he fell. PW3 an employee of the appellant stated that the trolley is operated manually and does not have brakes and one has to stop it manually.

7. DW1 stated that he rushed to the scene and observed the deceased but did not see any injuries, nonetheless he called for a car to take him to hospital thus did not witness the accident occur.

8. With this evidence, the trial court found nothing to support the allegation that the deceased was on duty on the material day. The appellant did not deny that the trolley is operated manually or that the trolley does not have brakes. The deceased ought to have known the nature of the trolley he was using. PW1 and PW3 statements are corroborated and more reliable and the defence did not controvert their statement. In apportioning liability equally the trial court applied the right principles. On the basis of the aforesaid reasons, I find no merit in this ground of appeal.

9. On the ground of quantum, the appellant submits that the award of kshs.100,00/= for pain and suffering and loss of amenities was excessive in the circumstances.

10. The respondent submits that the award on damages was arrived at with no error of principle. From doctor Salim's medical report the deceased suffered blunt trauma to the chest, back and right lower limb. The respondent proposed general damages at ksh. 100,000/= while the appellant proposed an award of ksh. 30,000/=. The learned trial magistrate awarded ksh.100,000/= in general damages. Looking at the decided cases, the nature of injuries and the rate of inflation, I find the award reasonable in the circumstances of this appeal. The trial court's award can therefore not be faulted.

11. In the end, I find no merit in this appeal, it is hereby dismissed with costs to the respondent.

**Dated, Signed and Delivered in open court this 16<sup>th</sup> day of February, 2018.**

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent