



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 208 OF 2013**

**APEX STEEL LTD.....APPELLANT**

**VERSUS**

**BERNARD ODHIAMBO BOLO.....RESPONDENT**

**(Being An Appeal From The Judgement of The Honourable E. K. TOO (Resident Magistrate) Delivered on 19<sup>th</sup> September, 2013 at Machakos in CMCC No. 1281 of 2009 - BERNARD ODHIAMBO BOLO = Vs= APEX STEEL LTD)**

**JUDGEMENT**

1. The Appeal arises from the judgement of Hon. E.K. Too Resident Magistrate in **Machakos CMCC No. 1281 of 2009** delivered on the 19/09/2013 wherein the Respondent was awarded general damages of Kshs.80,000/= together with costs and interest. The Appellant had been found wholly liable at 100% for an accident that had occurred on 4/3/2006 and in which the Respondent who was then in the Appellant's employment as a servant got injured.

2. The Appellant was aggrieved by the said judgement and lodged the present appeal and raised the following grounds of appeal:-

- (a) That the learned magistrate erred in law and fact in finding that the Appellant was liable for the accident.
- (b) That the learned Magistrate erred in law and fact in failing to take into account the evidence before him which clearly indicated that the Respondent was not injured at the Appellant's premises at the material time.
- (c) That the learned magistrate erred in law and fact for entering judgment against the Appellant.

The Appellant therefore sought for the following reliefs:-

- (i) That the appeal be allowed.
- (ii) The trial Court's finding on liability be set aside and the claim against the Appellant on liability be dismissed with costs.
- (iii) That the assessment of damages done by the trial court be set aside.
- (iv) That the Appellant be awarded costs of the appeal and of the court below.
- (v) That this court do grant such relief as it deems fit.

3. The Appeal was canvassed by way of written Submissions. It was submitted for the Appellant that the Respondent who had been a casual labourer was not on duty on the 4/3/2006 the date he is alleged to have been injured. It was further contended that the Respondent had not been injured as alleged and that even if such occurred then the Appellant's scope of duty of care was not absolute. Appellant's Counsel sought reliance on the case of Eastern Produce (K) Ltd = Vs Jonah Kibiwott Yego [2017] eKLR where the court held thus:-

“ The duty of the employer to ensure the safety of an employee is not absolute: it is one of reasonable care against a foreseeable risk of one that can be avoided by taking reasonable measures or precautions. It would be unreasonable to expect an employer to be his employee's insurer round the clock.”

It was finally submitted for the Appellant that the trial court erred and hence the appeal should succeed.

It was submitted for the Respondent that indeed the Respondent had been on duty on the material date and that he got injured due to the Appellant's failure to provide him with protective gear. Several cases were relied upon namely **Nickson Muthoka =Vs= K.A.R.I. - Machakos HCCA 93 of 2012, Devki Steels Mills Ltd =Vs= Thaikon Mwaka Okutoyi - Machakos HCCA. 18 of 2015, Live Wire Co. Ltd. =Vs= Felistus Wamaitha - NKU HCA 108 of 2008, Longonot Horticulture Ltd =Vs= Isaac Oluoch Kichama - NKU HCCA 309 of 2005 and Umar Shibali Omurunga =Vs= Wildlife Flowers Ltd [2012] eKLR**. It was finally submitted for the Respondent that the trial court had properly established liability upon the Appellant and hence the appeal should be dismissed with costs.

4. This being a first appeal, the court's duty is to re-evaluate the evidence tendered by the trial court and arrive at an independent conclusion. (see **Sele =Vs= Associated Motor Boat Co. Ltd [1968] EA 123**).

It was the evidence of the Respondent that he had been a casual labourer at the Appellant's premises and that on the 4/3/2006 he had been assigned duties at the twisting machine section. He stated that one of the metals injured his index finger. He stated that he was given first aid but not treated and he was forced to go to Kenyatta National Hospital and was later examined by Dr. Kimuyu who prepared a medical report. He blamed the Appellant for not issuing him with protective gear. He sought for compensation for the injuries sustained.

The Appellant called Leonard Musyimi (DW.1) who stated that he was a Supervisor at the Appellant's steel Mills Factory. He confirmed that the Respondent had been one of the casual workers in 2005 but that on the material date namely 4/3/2006 he was not on duty. The witness produced the attendance register as well as the injury register and the wages register. He also maintained that it was the policy of the Appellant to register any incidences of injuries. He denied the allegations by the Respondent since those who were present on duty on 4/3/2006 were duly paid their wages and that issues of injuries were indicated in the relevant accident register.

5. From the grounds of appeal and the evidence and exhibits presented before the trial court as well as the submissions of learned Counsels, it is not in dispute that the Respondent sustained injuries. The issues for determination are as follows:-

(i) Whether the Respondent was on duty at the Appellant's premises when the alleged injuries were sustained.

(ii) Whether the learned trial Magistrate erred in law and in fact in finding the Appellant solely responsible for the injuries and awarding the Respondent general damages of Kshs.80,000/=.

6. As regards the first issue the Respondent claimed that he was on duty at the Appellant's Steel Mills on the 4/3/2006 and that he reported for duty at 7.00 p.m. and got injured at 10.30 p.m. The Appellant's Supervisor one Leonard Musyimi denied the Respondent's assertion and maintained that the Respondent had been in their employment way back in 2005 but was not working for them on the alleged date namely 4/3/2006. The Appellant's witness produced the attendance register for the 4/3/2006 and 5/3/2006 which did not contain the names of the Respondent. The Appellant's witness also produced the casual workers daily wage sheet for the 3/3/2006 and 4/3/2006 and in which the Respondent's names do not appear. I have perused the said documents and indeed find that the Respondent's names do not appear. In fact in one of the wage sheets a casual worker is indicated with remarks "sick of - injury" and who is recorded as having signed for his wages. If indeed the Respondent had been injured after having worked from 7.00 p.m. upto 10.30 p.m, it is highly likely that the issue of his injury would have been noted on the register and the amount of wages he was to receive. Even assuming that the Respondent decided to seek treatment elsewhere, I find it rather curious that he could not thereafter go for his wages if at all he had worked on the 4/3/2006. Again the Respondent has not indicated whether or not he received his wages for that particular day. If he was not paid, I find he has not raised the issue in his pleadings as part of his dues for having worked for the Appellant on the 4/3/2006. The documents produced by the Appellant's witness were extensively interrogated before the retrial court and the Respondent was at liberty to demand for the original booklets from which the copies of the records had been obtained so as to rule out any whiff of fraud against him. He did not do so and hence the extracts of the registers became the only documents for reference on the question as to whether the Respondent was on duty on the date in question. The responsibility to prove the claim lay squarely on the Respondent to discharge. I find from the material availed before the trial court the Respondent's claim that he was on duty on the 4/3/2006 did not pass muster. The Appellant's version of the events backed by the documents appears to be convincing. This therefore leaves no doubt that the Respondent was not on duty at the Appellant's premises on the 4/3/2006 and that the Respondent's injuries must have been sustained elsewhere. Suffice to add that none of the Respondent's colleagues who were with him on the said date were called to testify and buttress the Respondent's claim of having been on duty on the 4/3/2006.

7. As regards the second issue and based on my above finding, it is clear that the learned trial magistrate erred in finding the Appellant solely liable in damages to the Respondent. It is noted that the Appellant's liability was stated to be 100% following the Respondent's claim that he was not only provided with protective gear but also that the work environment was not conducive. Indeed the Appellant who engaged in running a steel mills factory was under obligation to ensure that the working environment was conducive and also to provide the workers with the requisite protective gear. From the documents produced by the Appellant it is clear that issues of injury to workers are noted and documented for purposes of compensation under the relevant statute. It is also obvious that the Appellant would not endanger its workers handling metals and it is highly likely that protective gear such as hand gloves were being issued to the workers. Again workers who volunteer to apply for jobs in a steel mills factory are deemed to know that there are risks and were expected to appreciate them and be alert at all times. It is also the norm that new workers are inducted before embarking on the assigned tasks. Hence it would be quite unreasonable to expect the Appellant to have kept a close watch on the Respondent and others as they worked since they were not minors. As long as the Appellant had ensured that the general work environment was conducive, it was the responsibility of the workers to ensure they were careful in executing their duties to avoid mishaps. It was therefore erroneous for the learned Magistrate to slap the Appellant with 100% liability. Had the Respondent succeeded in his claim, I would have apportioned liability at 30% to 70% in favour of the Respondent.

On quantum, I note that the trial court awarded general damages of Kshs.80,000/= for pain and suffering. The Respondent sustained a deep cut wound on left index finger which was found by Dr. Kimuyu to have healed satisfactorily. Indeed it is trite that an appellate court can only interfere with the trial courts assessment of damages if the said court took into account an irrelevant factor or left out a relevant one or that the award is inordinately low or so high that it must be wholly erroneous estimate of the damages (see **Kemfro Africa Ltd T/a Meru Express & Another= Vs= A.M. Lubia & another [1982 - 88] KAR 727, Butt =Vs= Khan [1982 - 88] KAR 5**). It had been submitted before the trial court that a sum of Kshs.180,000 be awarded to the Respondent and the case of **Simba Posho Mills Ltd. =Vs= Onguti Fred [2005] eKLR** was cited in which a Plaintiff who sustained cut wound on right thumb and a degloving injury on middle finger was awarded Kshs.180,000/=. It had been submitted for the Appellant that a sum of Kshs.25,000/= be awarded and the case of **Igumbi Shadrack =Vs=**

**Bhagra Saw Mills Ltd HCC 3178 of 2008** was cited where was cited the Plaintiff sustained dislocated right thumb and bruises on forearm, knee and chest wall. Indeed the Respondent's injuries were of soft tissue in nature and going by the two authorities cited before the trial court, I find the awarded sum of Kshs.80,000/= as damages would have been adequate had the Respondent succeeded. The learned trial Magistrate erred in failing to establish that from the evidence placed before him the same did not establish the Respondent's case and ought to have been dismissed and thus the award of damages was erroneous.

8. In view of the foregoing it is the finding of this court that the appeal herein has merit and same is allowed. The judgement of the trial court dated 19/09/2013 is hereby set aside and substituted with an order that the Respondent's suit is dismissed with costs to the Appellant. The costs of this appeal are awarded to the Appellant.

Orders accordingly.

**Dated, signed and delivered at Machakos this 22<sup>nd</sup> day of March, 2018.**

**D. K. KEMEI**

**JUDGE**

**In the presence of:-**

Kenyatta for Kamau - for the Appellant

Nangwere for Mulyungi- for the Respondent

Kituva - Court Assistant