



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

**CIVIL APPEAL NUMBER 112 OF 2005**

**AMALGAMATED SAW MILLS.....APPELLANT**

**VERSUS**

**DAVID K. KARIUKI..... RESPONDENT**

*(Being an appeal from the Judgment /Decree of Hon. A.B.M Mongare, Resident Magistrate,  
Nakuru Delivered On 9<sup>th</sup> June, 2005 in Nakuru CMCC No. 2113 of 2000)*

**JUDGMENT**

1. The appeal before this court arose from the judgment of the trial Magistrate who after hearing the suit found the appellant 90% liable in negligence and the Respondent 10% liable in contributory negligence. On *quantum* of damages, the court awarded a sum of Kshs.35,000/= in damages for compensation for injuries sustained that the appellant deems to be high in the circumstances and nature of the injuries.

The Respondent in his statement of claim before the trial court was that while in the course of work at the appellants premises he sustained injuries when he was hit and cut by a piece of timber on his right foot. He attributed the injury to negligence by the appellant, and particularly for failing to provide protective devices while performing his duties.

In its statement of defence, the fact of employment was denied and so was the occurrence of the accident and the injury.

2. The respondent's case before the trial court was brief. That he was permanent employee of the appellant and on the material day was assigned the duty of splitting logs, that the machine operator let it go and before he held it, it fell on him causing him to slip and fell on his right leg. He was injured. It was his evidence that he was taken to Elburgon hospital where he was treated and issued with a treatment card produced as PExt 3. He named one Njuguna as his supervisor and Mwaura as the manager.

3. The appellant's evidence was adduced by one Maurice Aloo, the records keeper. He confirmed to the court that the respondent was a permanent employee of the appellant and was on duty on the material date but denied the occurrence of the accident and the injury. He produced a master roll register and records for injuries for the day. It was his evidence that if there was an injury, it would have been recorded in the accident register. On cross-examination the defence witness admitted that he did not witness the accident as he was in the office and also confirmed that Njuguna was the respondents supervisor and that employees and could seek treatment at any medical facility.

4. In his judgment, the trial Magistrate upon analysing evidence adduced before the court and considering submissions by counsel, found that the appellant did not provide the plaintiff with protective gadgets but as the respondent was an experienced worker for three years with the appellant, ought to have done something to protect his own safety. He apportioned liability at 90% against the appellant and awarded Kshs.35,000/= damages for pain and suffering for the soft tissue injuries the respondent sustained.

5. The duty of this appellate court is to re-evaluate the evidence tendered before the trial court and find out whether the conclusion reached by the trial Magistrate is based on the evidence adduced. If it finds that the conclusion is based on no evidence, or it took into account an irrelevant factor or omitted to consider a relevant factor, then, the court would make its own independent findings and conclusion. See **Selle -vs- Associated Motor Boat Co. Ltd (1968) E.A 123.**

6. In the matter of assessment of damages, and guided by the principles enunciated in the case **Kemfro Africa Ltd t/a Meru Express and Another -vs- A.M. Lubia & Another (1982-88) L. KAR**, the court will be very slow to interfere with the trial court's discretion in the assessment of damages unless it is evident that the said damages are either too low or too high as to represent a wholly erroneous estimate of the damages.

7. As I stated above, the Respondents as well as the appellants evidence before the trial court was very short and scanty.

There is no dispute that the respondent was an employee of the appellant and was on duty on the material date the 26<sup>th</sup> May 2000. These facts were admitted and confirmed by the appellant's only witness, the Records-keeper. What is in dispute is whether the respondent sustained an injury while on duty. The appellant's evidence was contained in the master roll register and the injury register that DW1 stated was being filled by the supervisor not himself. He confirmed that the registers had missing parts and that the supervisor's records were more original. The supervisors records were not produced in court. In my view, the records officer could not deny or confirm from the records whether or not the Respondent sustained the injuries.

8. In the case **Sokoro Saw Mills Limited -v- Grace Nduta Ndung'u HCA No. 99 of 2003 at Nakuru**, Hon. Justice Kimaru held that evidence of a master roll and accident book and documents prepared by the appellant without the respondent's input can not be considered to represent factual evidence in the face of evidence adduced by the respondent.

The respondent in his part produced the Treatment card issued from Elburgon hospital dated 26<sup>th</sup> May 2000 to prove that he was injured and treated on the same day. The appellant did not object to the production of the said treatment card. It indicated that the respondent had been torn by a sharp piece of stick at his work place. Upon the said evidence, this court finds that the respondent was injured at his place of work and sustained the injuries stated in the treatment notes and Dr. Kiamba's medical report dated 12<sup>th</sup> June 2000.

9. The respondent attributed the accident and injury to negligence by the appellant.

In **Frida Kimotho -vs- Ernest Maina HCCC No. 3720 of 1995**, the court held that:

***“the happening of an accident is not in general prima facie evidence of negligence. The plaintiff must ordinarily give affirmative evidence of negligence on the part of the defendant which caused the accident.”***

Under the provisions of **Section 107 of the Evidence Act**, a party who desires the court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exist. The respondent attributed the accident and injury to particulars of negligence he stated in his plaint. In particular, he stated that the appellant failed to provide him with proper and/or safe system of work and protective devices while engaged with his work.

Evidence was adduced that the respondent was not given protective gadgets that would have minimised the injury:

***“At about 9.30 a.m. the operator had a log and before I held it it fell on me. It slipped and fell on my right leg.”***

The work at hand was manual in nature. From the above statement, the respondent needed no supervision on how to split timber or how to hold it. An employer cannot babysit an employee especially in manual tasks that need no special training or supervision. He must work and at the same time take precautions on his own security and safety. The court finds that the respondent and the machine operator, an agent and employee of the appellant contributed largely to the accident, together with the none-provision of protective gear to the respondent. It is the court's finding that the respondent has proved a casual link between the appellant's negligence and his injury and upon which negligence on a balance of probability has been proved **See Amalgamated Saw Mills Ltd -vs- Stephen Muturunguru HCCC No. 75 of 2005**. The upshot of the above is that the appellant's appeal on negligence must fail.

10. I find the ratio of contributory negligence by the trial court sufficient in view of the manner the accident occurred. The ratio of 90:10 in favour of the respondent is upheld.

11. The appellant submits that the respondent ought to have been awarded a sum of Kshs.20,000/= in general damages, citing authorities decided over ten years ago. The respondent has urged the court to uphold the sum of Kshs.35,000/= awarded by the trial court.

The injuries sustained by the respondent can be classified as minor soft tissue injuries that had all healed at the date of hearing of the suit. The appellant has not shown the court in what way the trial court erred in arriving at the said sum. It is this court's considered view that the sum of Kshs.35,000/= is not high as to represent an erroneous estimate of the damages. This court will not interfere with the trial court's discretion in that regard.

12. For above reasons, the appeal herein is found to lack merits. It is dismissed with costs.

**Dated, signed and delivered in open court this 28<sup>th</sup> day of April 2016**

**JANET MULWA**

**JUDGE**