REPUBLIC OF KENYA IN

THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 250 OF 2009

AMALGAMATED SAWMILLS LIMITED..... APPELLANT

VERSUS

PAUL KAMANGA GITAU.....RESPONDENT

(BeingAppealfromtheJudgment/DecreeofHon.Soita,Principal

Magistrate, Molo delivered n 29th October, 2009 in Molo SRMCC No 276 of

2003)

J U D G M E N T

1.The appeal before the court arises from the Judgment of the trial court that found the appellant 90% liable in negligence and awarded the respondent damages for pain and suffering of Kshs.90,000/=.

The respondent had sued the appellant seeking general and special damages for injuries he sustained on the 22nd September 2000 while in the course of employment and performing duties as assigned to him by the appellant. He blamed the employer for negligence.

2. The appellant preferred the appeal upon six grounds that in summary may be summarised into two:

> ***1.That the learned trial magistrate erred in law and fact in holding the appellant 90% liable upon insufficient evidence.***
>
> ***2.That the Learned trial Magistrate erred in law and fact in awarding excessive damages to the respondent and failing to subject special damages to contributory negligence of 10%.***

3. Being first appellate court, I am under a legal duty to reconsider and re evaluate the evidence before the trial court and come up with my own findings and conclusions.

The respondent in his plaint dated the 20th November 2003 stated that while working at the appellants workshop he was hit by a falling log thereby he sustained injuries.He blamed the appellant for failure to provide him with safe and proper work system, protective devices and exposing him to injury. The appellant denied the claim in its defence. It denied that the respondent was its employee and further denies that he was injured while in course of employment and denies all particulars of negligence as itemised.

4. In his evidence, the Respondent testified that he was a casual employee of the appellant and on the 22ndSeptember 2000, was using a hoisting machine to lift logs and while doing so, the hoist snapped and

the log fell hitting him on the left leg. He stated that he was given first aid at the work place and later treated at Njoro Health Centre. The treatment card was produced as PExb, and later Dr. Omuyoma prepared a medical report referring to the said treatment card.It was his testimony that the employer was neligence as it did not provide him with an apron and gum boots that could have prevented the injuries, and that the appellant failed to maintain the machine that snapped. On cross examination, the respondent stated that he did not sign the muster roll nor was it his duty to fill names of injured persons in the accident register.

5.The defendant's evidence was tendered by two witnesses. DW2, Geoffrey Kibobi Kimiti testified that he was the wages clerk, with the appellant and he kept company records for the employees and prepared wages. He confirmed that the respondent was its employee and that on the 22nd September 2000 he was at work and that no injury was reported. He produced an accident register that had no name of the respondent. He also stated that the hoist machine was not faulty. He told the court that workers do not sign on the muster roll nor in the accident register.He also confirmed that the was not the respondents supervisor.

6. DW1 was a clinical officer at Njoro Health Centre. He testified his duties were treating patients and keeping records. His testimony was that on the 22nd September 2000, there was no record of the respondent having been teated in the facility. He said that treatment card No. 9838/00 was not issued on the 22nd September 2000 but on the 2nd December 2000 to a different patient, a minor who was treated for malaria. He however admitted that the card showed that, the patient received treatment. He also told the court he was not working at the health centre on the material date nor did he have any document to authenticate that he was a clinical officer at the said hospital.He also confirmed that mistakes are made where a card number is given a to two patients as it happened at the material time.

7. The trial Magistrate upon analysis of the evidence made findings that the respondent was an employee of the appellant and was injured while in the course of employment. He was satisfied that the respondent was treated and issued with a treatment card at Njoro Health Centre. On a balance of probabilities he found the appellant liable in negligence at 90%.

8.In his submissions the appellant, counsel submitted that the respondents name did not appear in the accident register and that it was his duty to ensure that his name was thus entered. As to the treatment card, it is submitted that it was a forgery ashis name was not in the patients register for the material date and the clinical officer casted doubts on whether the respondent was treated therein. He further submitted that as the muster roll showed that the respondent worked the whole day, he could not have been injured. He submitted that the burden of proof lay upon the respondent to establish a casual link of his injury and the appellant. He relied on the case **Kiema Mutuku vs Kenya Cargo Hauliers Services Ltd e KLR** that there is yet no liability without fault and that the respondent failed to prove any liability against the appellant. Citing the above case, he stated that a plaintiff has to prove one of the forms of negligence as alleged against an employer, and that none of the particulars of negligence were proved.

The Respondent urged that the appeal was without merit, as the respondent proved his case to the required standards, and that the respondents evidence was unconverted and was truthful.

DW2 confirmed his having been such an employee. In dispute is whether the respondent was injured while in the course of employment of the appellant and if so whether the appellant was negligent leading to the injury.

9.The court has considered the evidence.

DW1, the clinical officer was not working in the said clinic at the material time. He admitted patients could mistakenly be given same card numbers, and that could have happened in this case. He also admitted that the respondent received treatment at the health centre.

Proof in a civil case is upon a balance of probability. That is not as high as in a criminal case. It is a

matter of weighting the evidence tendered by several parties and deciding which is more probable and believable that the other with regard to prove of an incident.

10.The court is not persuaded by the appellants evidence more so as it relies on the clinical officers evidence which is in the court's view was not convincing.

An employer is under a legal and statutory duty to provide its servants with a safe place of work and safe systems. The respondent testified that the machine he was using snapped leading to the log he was hosting hitting him.

Machines do not just snap.They must be defective to snap. It is the obligation of an employer to provide safe working devices that are regularly maintained so as not to cause injury to the handlers.

For the injury the respondent sustained, and after being given first aid, he did not need to go home. He worked the whole day and only decided to seek treatment later after work.

11.In the case **Otieno Nalwoyo vs Mumias Sugar Co. Ltd (2014) e KLR** the court held that an employer is under a duty to provide its servants with a safe place of work and that duty is not merely to warn servants against unusual dangers known, and to take reasonable care to avoid them.

The respondent pleaded that he was not provided with gum boots and Apron, and that if provided, they would have prevented the injury. This piece of evidence was uncontroverted.

An employee needs to prove any one form of negligence as pleaded. See **Otieno Nalwoyo** case (Supra).

The court finds that the respondent proved that he was not provided with safety devices and gum boots that would have minimised the injury. The court also makes a finding that the respondent proved a link between his injury and the employers negligence as stated above.

In **Amalgamated Saw Mills Ltd vs Stephen Mururinguru HCCC No. 75 of 2005**, it was stated:

> ***"It is trite law that the burden of proof of any fact or allegation lies with 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"***

12. The court finds the respondents evidence more probable and believable and comes to the conclusion that the respondent was injured, treated and issued with a genuine card at the Njoro Health Centre. The trial Magistrate can therefore not be faulted for arriving at the same conclusion. On quantum of damages, Dr. Omuyoma's medical report showed that the respondent sustained a deep cut would on the left leg and soft tissues injuries. The trial court awarded a sum of Kshs.90,000/= for pain and suffering on the 29th April 2009. Citing several authorities the appellant submits that Kshs.50,000/= is more reasonable.

For comparable and more recent authorities, the awards range between Kshs.80,000100,000/=

See **Bigot Flowers (K) ltd (Supra), Eldoret Steel Mills Ltd vs Charles Owino (2012) e KLR and Ol-Njorowa Ltd vs Alfred Watila Wekesa HCA No. 32 of 2008.**

13. It is trite that an appellate court will be very slow to interfere with a trial court's discretion on assessment of damages unless it is shown that in arriving at the said award, the court did not consider or failed to take into account a relevant factor or if the amount of award is so inordinately low or high as to be a wholly erroneous estimate of damage – **Kemfro Africa t/a Meru Express Services and Another -vs Lubia & Another (1982) e KLR 727.**

This court is not persuaded that the award by the trial Magistrate ought to be disturbed. It is within the range of precedent. It is confirmed.

In its totality and for the reasons stated above the court finds that the appeal is devoid of merit and is dismissed with costs.

Dated, signed and delivered in open court this 21st day of July 2016

JANET MULWA

JUDGE