



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 324 OF 2007**

**BHUPCO TEXTILE MILLS LIMITED .....APPELLANT**

**VERSUS**

**ALFRED OGUTU.....RESPONDENT**

**(Being an appeal from the judgment and decree of the Honorable Senior Magistrate M. Wachira (Mrs) at Thika dated 17<sup>th</sup> April, 2007 in Thika CMCC No. 1476 of 2005)**

**JUDGMENT**

1. The plaintiff sought for general and special damages against the defendant company for injuries sustained while working for the defendant. The plaintiff was a machine operator but on 23<sup>rd</sup> August he was assigned different duty to carry Cartons of yarn that weighed 50 Kgs while he weighed only 48 kgs. In the course of this duty his back snapped and he fell. He reported to the Head of Department who had assigned him the work. He went to Pilot Medical Clinic and was treated and adduced the treatment notes as evidence. He was given 5 days off duty. Later he obtained a medical report from Doctor Wokabi and paid Kshs. 2,000/-. The treatment notes and medical report were produce by consent. He blamed the defendant for failing to provide a fork lift to carry the said loads.
2. The defendant denied liability and called 1 witness. Titus Kimeu, the store clerk who refuted that the cartons that the plaintiff was asked to carry weighed 50kgs but 26.7Kgs.He clarified that the plaintiff was a weaver to switch clothes and machine operator but his Head of Department had requested he carry the cartons. He added that his department did not require any skills but strength.
3. The Court awarded liability in at 90:10 against the defendant and warded the plaintiff damages of Kshs. 120,000/- plus costs of suit and interest. The appellant aggrieved by the decision of the Honorable Senior Resident magistrate M. Wachira (Mrs.) in Thika CMCC No.1476 of 2005 dated 17th April, 2007 filed a Memorandum of Appeal dated 11<sup>th</sup> May 2007 and raised the following grounds;
  - i. That the Learned Trial Magistrate erred in law and fact in failing to consider the pleadings of the appellant and respondents and the law applicable in totality in making findings in the case.
  - ii. That the Learned Trial Magistrate erred in law and fact in finding that and holding the appellant liable to the extent of 90%
  - iii. That the Learned Trial Magistrate erred in law and fact in failing to consider the evidence of the appellant and respondents in totality.
  - iv. That the Learned Trial Magistrate erred in law and fact in assessing damages in the sum of Kshs.

120,000/-.

- v. That the Learned Trial Magistrate erred in law in failing to give reasons for entering the judgment on liability against the appellant and in assessment of damages.
  - vi. That the appellant craves the leave to add, amend alter or omit any ground or grounds of appeal at or before the hearing.
4. On the issue of quantum, counsel for the appellant urged the trial court to award KShs.40, 000/= as general damages. The appellants did not rely on any authority before the trial Court. The plaintiff/respondent relied on two cases; **Sebastian M. Bunyasi vs Akamba Public Roads Service Ltd. NBI HCCC No. 1507 of 1989**. The plaintiff sustained a disc pro lapse resulting into pains in the back and numbness in the 2<sup>nd</sup> and 5<sup>th</sup> finger. Permanent injuries that would improve with time. General damages for pain and suffering and loss of amenities assessed at Kshs. 180,000/-. In the case of **Gideon Maundu Kavoi –vs- Samson Musaki Kiilu MKS HCCC No. 10 of 1993** the plaintiff right radical nerve was injured after he was stabbed in the left lumbar as well as a cut on the right arm elbow. The plaintiff was awarded Kshs.250, 000/-. I find that in these cases the plaintiffs suffered more severe injuries than in the instant case.
  5. The fact that the respondent/plaintiff was an employee of the appellant is not contested. The treatment notes dated 23/8/05 show that the plaintiff /respondent was in pain and unable to walk upright and had tenderness on the lumbar Sacral region. From the evidence on record it is clear that the respondent indeed did sustain injuries while in the course of duty at the defendant's/appellant's place of work. The defendant I find did not avail proper tools for the respondent/plaintiff to carry out his duties effectively. On the issue of liability I find no fault with the ratio awarded by the lower Court. I also find that the sum awarded as general damages of Kshs. 120,000/- to be reasonable in the circumstances.
  6. I find that the appeal lacks merit and the same is dismissed with costs. The appellant's appeal fails both on the ground of liability and in the aspect of quantum. The respondent shall have costs of the appeal and the suit before the trial court. Orders Accordingly.

**Dated, signed and delivered this 24<sup>th</sup> day of October 2014.**

**R.E. OUGO**

**JUDGE**

In the presence of:-

.....For the Appellant

..... For the Respondent

.....Court Clerk