



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL APPEAL 191 OF 2008

DEVKI STEEL MILLS LTD.....APPELLANT

VERSUS

JAMES MAKAU KISULI.....RESPONDENT

(Being an Appeal from the Judgment in Machakos Chief Magistrate's Court CMCC NO. 258 of 2004 by Hon F. Muchemi on 26.11.2008)

JUDGMENT

1. **James Makau Kisuli** is the Respondent in this Appeal ("Respondent"). On **07/07/2000**, he was injured at his then place of work, a factory owned by **Devki Steel Mills Ltd**. **Devki Steel Mills Ltd** was his former employer. He sued it at the Chief Magistrate's Court in Machakos and prevailed. Naturally, **Devki Steel Mills Ltd** was not thrilled by the results. It has now filed this appeal to overturn the decision of the lower Court on both liability and quantum of damages. It is, therefore, the Appellant herein ("Appellant").
2. The facts can be easily stated. The Respondent worked as a Machine Operator for twisted metal. On **07/07/2000**, the Respondent was at his machine. He was with his assistant, **Jonathan Nzioki Simon**. It was around **5.00 AM**. They were working the night shift. They were loading metal rods into their machine. The machine right next was operational; twisting metal rods in its wake; its motor running and roaring. The Respondent refers to that machine next to the one he used to operate as "Machine No. 2." Suddenly, a piece of metal from Machine No. 2 broke off from the motor and flew through the air – vicious in its force; rapid in its velocity. **Jonathan Nzioki Simon**, the Respondent's assistant immediately recognized what was happening and scampered to safety. The Respondent was not so lucky. He was bended at the waist his gaze away from the gathering danger.
3. The flying piece of metal was vicious in its contact with the Respondent. It hit him in the back, pelvic and buttocks area and forcefully threw him to the ground. As his fellow workers gathered around him to offer help and solace, the legal journey which will culminate, perhaps only fleetingly so, with this judgment began. It is a journey whose main road is paved with the desire and objective of the Respondent to obtain compensation for his injuries sustained on that fateful **Saba Saba day**. If the subject of his legal journey is compensation, the object of his endeavours is the Appellant.
4. The Respondent is convinced that the accident which resulted in his injuries was no accident at all. He believes it was authored by the Appellant in its singular failure to provide a safe working environment. When he signed up for employment, he urges, he expected his employer to observe his statutory and common law duty of care towards him. Core among that duty is the obligation to provide a

safe environment to work. Failure to do so is negligence. That was the Respondent's theory in the Court below. He prevailed there and so he is sticking with it here. He seeks restorative justice in the form of compensation for the injuries he has suffered as a result of what he characterizes as the Appellant's negligence. The exact nature of the injuries he suffered is also intensely contested but that issue will populate some paragraphs below.

5. Of course this would be a non-suit if the Appellant concurred with the Respondent's theory. Although the Appellant lamely resists that there was an accident involving the Respondent on **07/07/2000**, those formalistic motions of denial and putting the Respondent to "strict proof" can be easily disposed off as the first formal act of this judgment. Mercifully, the Respondent's Written Submissions will come in the Court's aid. Those submissions reminds all and sundry that the Appellant's own witnesses admitted on oath that the Respondent was injured while at work. Witness the testimony of DW1 (p. 51, Record of Appeal):

...On the material day which I cannot remember the date, the Plaintiff [Respondent] reported to me that he had been hurt by the machine...

And a little while later when DW1 says on cross-examination:

I know **James Kisilu**. I was his supervisor. He was slightly injured while working and he got first aid... He was injured in the night of **07/07/2000**. I was not on night shift. The injury was reported to me by the supervisor

Or that of DW2 who dispels all doubt thus:

James Kisilu was our worker. He was injured while on duty.

6. Like the Learned Magistrate below, we can proceed armed with that first finding: the Respondent was injured while on duty. In my view that leaves two major issues in need of analysis and resolution. First, since the injury occurred at work as established above, was the Appellant liable for it? And if so, to what extent, and for how much? The resolution of this latter twofer must contend, of course, with the dueling accounts of the extent of the injuries to the Respondent. This, then, defines our remaining task at hand.

7. So, was the Appellant liable for the accident? There are no prizes for guessing the Appellant's views on this. The Appellant reaches the result that it is not to blame for the accident on account of three arguments. First, it urges that the Respondent was not wearing protective gear even though he had been provided with the same. Second, the Appellant says it satisfied its statutory, contractual and common law duty of care towards the Respondent. As such, if harm still came to the Respondent, it must fall under that category that meets the definition of "accident" or an "act of God" for which there can be no civil liability. That is, the Appellant would like the Court to realize, unless the Court holds the Appellant liable under a strict liability theory. Needless to say, the Appellant finds no legal, prudential or precedential basis for such a holding. That would be unprecedented in law, contrary to existing decisions of our Courts, and, above all, bad for business. Third, the Appellant pleads the doctrine of *volenti non fit injuria*: the work offered to the Respondent was inherently dangerous. He willingly and voluntarily accepted it. He calculated his risks. He rationally accepted them. He now cannot reverse course and blame the employer for accepting to run the risk.

8. Let's take stock of these arguments before proceeding. First, the Appellant misrepresents the testimony when he says that the Respondent "admitted that he was provided with safety gear." In truth, the Respondent admitted to receiving a pair of gloves. He also admitted he was not wearing them during the injury. In my view the argument about protective gear is a red-herring here: there is absolutely no demonstration at all that the safety gear the Appellant claims to have provided would have prevented the accident even if we accepted its position as saintly true. A pair of gloves would not have changed the course of that flying piece of metal. Neither would have a pair of boots. And so, on to the Appellant's second theory of non-liability.

9. The Appellant's legal argument about where the duty of an employer to provide a safe working environment ends is, admittedly, an ingenious one. Relying on a legion of mainly English cases, the Appellant has staked out an economically attractive position: the duty of an employer ends with the provision of a reasonably safe system of work in the circumstances. It relies on *Wilsons and Clyde Coal Co. v English* [1938] AC 79 for that position. And then it invokes the authoritative *Winfield and Jolowicz on Tort* (13th Edition at p. 189-190) to leave us with this gem which I have paraphrased: whatever the duty an employer owes to his servant, it is nevertheless a duty of care, not an absolute duty.

10. So far, we have established, through Appellant's lawyer's erudition and industry, that the duty of an employer is not an absolute one. The duty is to take reasonable care so as not to carry out operations in a manner which exposes employees to unnecessary risk. Hence, the Appellant is suggesting the legal test to use to assess if the employer has met its obligations. Yet, as every student of the law knows, determining what is "reasonable" is ridiculously difficult. And so, in aid of an effort to mitigate the fuzziness of the standard suggested, the Appellant proposes to collapse this analysis with one of *volenti non fit injuria* as the English cases have done. Here, again, the Court has benefitted from the industry of the Appellant's lawyer who discovered and shared this legal wisdom from the English case of *Withers v Perry Chain Co.* [1961] 1 WLR 1314, 1320:

In my opinion, there is no legal duty on an employer to prevent an adult employee from doing work which he or she is willing to do. If there is a slight risk...it is for the employee to weigh it against the desirability, or perhaps the necessity of employment. The relationship of master and servant is not that of a schoolmaster and pupil...it cannot be said that an employer is bound to dismiss an employee rather than allow her to run a small risk.

11. As I understand it, the Appellant is urging that in determining the outer limits of the employer's obligations to provide a safe working environment, we must take into consideration economic and liberty principles. Both counsel a loose rather than strict standard. Although not specifically teased out, one can almost hear the Appellant's real arguments just beneath the legal precedents it has supplied: Excessive obligation on the employer would be inefficient because it would not align the risk and the economic benefits. Employers should only be expected to rationally be responsible for those risks which are efficient to shoulder. At the same time, in assessing those risks which employers are taken to have consented to shouldering, one must take into account the consent of the employer: where she voluntarily takes on a position fully cognizant of the dangers, her liberty interests are expanded by refusing to hold the employer responsible if the risk comes to pass. After all, the argument goes; the employee rationally calculated the risk and willingly took up the "risky" job.

12. Taking all these into consideration, the Appellant urges the Court to reverse the trial Court's determination of liability and find for the Appellant. Though enthralled by the legal and economic arguments, I refuse to bite. I can safely do so even without quarrelling with the philosophical foundations of the Appellants arguments. I accept that the employer's duty has its limits. And I accept that a proper test for that limit is one of "reasonableness." And I accept, for purposes of this specific case because the issue of strict liability is not raised or canvassed, that the employer's duty falls short of "strict liability" in cases such as the one at bar. This means that I accept that the determination of what is reasonable for the employer to do to protect the employee is measured by a matrix of factors which must include the costs of a particular intervention, measure or improvement vis-à-vis its protective value; the training afforded to the employee to mitigate the danger espoused in the work; the degree of knowing voluntariness and acceptance of the risk involved; the degree to which the risk involved can be said to be factored into the pay of the employee and so forth.

13. Taking all these factors into consideration, can we say that the Appellant herein discharged its duty to act reasonably in providing a safe environment for its employees? The Appellant says that it would have been prohibitively expensive and unrealistic to construct solid barriers around each machine as the Respondent suggested was the way to protect the machine operators. That might be true. Or it might not be. And that is the point. We do not know whether it is prohibitively expensive or unrealistic to provide that protection. The Appellant placed no materials before the Court below for it to be able to make that call. The chips must fall where they lie. This position is made more morally attractive by the fact that the

Appellant has not even explained away negligence in this case. It has not even taken the step to demonstrate that the machines were kept in good working order and all reasonable precautions were taken to maintain them as such.

14. We have, therefore, reached a point where we can decisively say that I agree with the Learned Magistrate below on her finding of liability at **100%**. Armed with this second major finding, we can bravely go into the third major issue presented by this appeal.

15. That sends us to the contested issue of quantum via the prickly question of extent of injuries suffered by the Respondent. Surprisingly, there is an area of deep agreement. All the three doctors who examined the Respondent were united in their view that the injuries which the Respondent suffered were severe soft tissue injuries. Then the agreement fades. **Dr. Kaburu** examined the Respondent on **19/05/2004**. That is roughly **four years** after the accident. In his report, he first lists the injuries the Respondent actually suffered on **07/07/2000**:

- a. Severe soft tissue injuries to the left side of the pelvis
- b. Severe blunt injury to the right shoulder

16. **Dr. Kaburu** in his report which was received into evidence then lists what he terms “current complaints”:

He [Respondent] is unable to lift heavy objects using the right arm due to the pains at right shoulder. The worst inhibited movements are extension and abduction. He is also unable to completely flex the back due to pains. These are confirmed on examination. He has occasional urinary incontinence and experiences loss of libido. Still using clutch (sic) with a claudicalion distances of about **300 metres**.

17. The medical report of **Dr. Otsyeno**, which was also received into evidence, was remarkably similar to that of **Dr. Kaburu**. So remarkably similar are the two reports that they are almost identical in their wordings. This raises a question of credibility whether one is simply based on the other. Suffice to say that according to **Dr. Otsyeno** who testified on behalf of the Respondent, the injuries suffered by the Respondent are pretty severe and they have denied him any ability to live normally or engage in economic activities. On the date the case was heard, the Court made a notation that the Respondent was still using crutches and was unable to stand.

18. There seems to be some mystery here. How does a blunt injury to soft tissues, however severe, lead to the life-altering changes **Dr. Otsyeno** outlines? **Dr. Modi** who examined the Respondent on behalf of the Appellant appears equally perplexed. Of course the doctor has an incentive to feign stupefaction as the Learned Trial Magistrate observed. But this Court is aghast with wonder as well. It behooved the Respondent and his counsel to put on record an explanation for this.

19. We can bracket this issue for a bit and consider assessment of damages. There are certain things this Court readily agrees with the Appellant’s counsel. First, with respect to the Learned Trial Magistrate, loss of earnings were neither pleaded nor proved in evidence. Yet, the Learned Magistrate awarded a sum of **Kshs. 1,344,000/=** under that head. That award cannot stand. This makes the arithmetic error which the Appellant correctly raises moot. For the Respondent to have recovered any sums under this heading he needed to have pleaded it. He did not and therefore he cannot recover under this head.

20. Considering the special damages awarded, again the Respondent orally sought an amendment to his pleading to include a sum of **Kshs. 110,550/=**. He cannot recover anything more than that. The Respondent now says that he had, in fact, orally amended his plaint to include a figure of **Kshs. 149,114/=**. This was the first time the matter had proceeded *ex parte* before Learned Magistrate **S.M. Mwendwa**. The judgment entered was eventually set aside and the trial started afresh. It is unclear whether the oral amendment done pursuant to the *ex parte* proceedings was preserved when the proceedings and judgment were set aside and the trial started afresh. Even assuming the Plaint now stood amended as per the oral amendment of **24/04/2006**, the Respondent’s lawyer orally sought yet another

amendment on **25/10/2007**. This time he requested that the special damages in the Court be amended to read **Kshs. 110, 550/=**. Hence, even if the amendment of **24/04/2006** withstood the setting aside, it was superseded by the amendment of **25/10/2007** which was granted by the Court. It follows, therefore, that the Respondent could not recover anything more than **Kshs. 110, 550/=** in special damages. The Respondent produced receipts which exceed this amount. The receipts are not seriously or credibly contested. I therefore treat them as sufficiently proved.

21. Returning now to the issue of general damages, we must now confront the mystery of the severe soft tissues which seemingly led to life altering and permanent disability. My view is that while the Learned Magistrate was entitled to believe the Respondent and his doctor when they said that the aftermath of the soft tissue injuries the Respondent suffered was that it led to the permanent disabilities and loss of amenities the Respondent claimed, she needed to rely on the evidence on record which establishes the severity of the injuries. In my view, there needed to be expert opinion to explain how a soft tissue injury however severe can lead to immobility and inability to walk except on crutches for more than seven years. There was also a need to explain how an injury to the pelvis and back leads to incontinence and loss of libido.

22. In thinking about all these, it is important to recall that **Dr. Otsyeno** did not get to examine the Respondent until four years after the accident. The treatment notes which were written in closer temporal proximity to the accident tell a story of remarkably minor injuries and conservative treatment plans than we see detailed in **Dr. Otsyeno** medical report. For example, on **15/12/2000**, a **Dr. Omega** saw the Respondent who was complaining of numbness in the left thigh and pain on the left side of the body. He recorded that the Respondent was clinically “in good condition and had no physical abnormalities. The systems were essentially normal.” Dr. Omega reported that the Respondent was treated with pain killers and multivitamins. The hospital cards from Machakos General Hospital are equally mild in the descriptions of the injuries of the Respondent. Finally, it should be recalled that the Respondent continued going to work for a number of days immediately following the accident.

23. All these factors, in my view, raise some very significant doubts about whether the severe physical disabilities and lack of amenities the Respondent complained of by the time of trial were, in fact, caused by the accident. There is simply no theory that was advanced to make that connection and the tell-tale signs point in the opposite direction. Hence, reevaluating the evidence produced at trial as a first Appellate Court is entitled to do, I have come to the conclusion that the Respondent suffered severe soft tissue injuries – but I cannot attribute the loss of amenities and diminished earnings and other permanent disabilities to the accident. There is simply no proof for that.

24. As such, I would assess damages as ordinary soft tissue injuries albeit serious ones. In doing so, I have, first, to remind myself what the Court of Appeal said in the case of *Arrow Car Ltd V. Elijah Shamalla Bimomo and others*, Civil Appeal No. 344 of 2001 (unreported):

What about the injuries sustained by the respondents in this appeal? We have indicated that taking into account the fact that comparable injuries should be compensated by comparable awards and as the 1st and 3rd respondents herein suffered what the doctors described as soft tissue injuries the award of **Kshs. 350,000/=** for such injuries as made by the superior court are in our view high as to warrant our interference. We must now consider what we think ought to have been awarded in respect of each respondent. Taking into account other decided cases on soft tissue injuries, we think that the 1st respondent’s injuries should have attracted an award of **Kshs. 150,000/=** as general damages. We therefore, award him that sum.

25. Applying the cardinal principle in awarding damages namely that comparable injuries should, as far as possible, be awarded comparable damages, I find the award of **Kshs. 800,000/=** for general damages to be manifestly excessive given my findings and analysis above. Considering the severity of the soft tissue injuries, I would award a sum of **Kshs. 250,000/=**.

26. In the end, therefore, this appeal has succeeded to the extent that some heads of award of damages have been disallowed and others reduced. The findings and holding on liability shall remain

undisturbed. To that extent, therefore, the appeal has partly succeeded and I will make no order as to costs.

27. The final order of the Court shall be that the Appellant is liable to pay to the Respondent the following sums:

- a. An amount of **Kshs. 250,000/=** as general damages;
- b. An amount of **Kshs. 110,550/=** in special damages

28. As aforesaid, there will be no order as to costs. This will be the orders of the Court.

DATED, SIGNED and DELIVERED at MACHAKOS this day 12TH day of MARCH 2012.

J.M. NGUGI
JUDGE