



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET

Civil Appeal 81 of 2002

between

ELDORET STEEL MILLS LIMITED APPELLANT

AND

CHARLES OWINO RESPONDENT

[Being an appeal from the judgment of the Chief Magistrate, Hon. Solomon Wamwayi dated 9th July, 2002 at Eldoret Chief Magistrate's Court in Civil Case No. 983 of 2001]

JUDGMENT

Eldoret Steel Mills, the appellant, was sued by **Charles Owino**, for damages for injuries he sustained on 12th January, 2001 while, he said, he was engaged by the appellant as a casual labourer. He pleaded that on the said date, while lawfully and diligently working on a metal rod twisting machine, in the scope of his employment, iron rods left the twisting machines and injured him as a result of which he suffered loss and damages. He alleged in the particulars of negligence:-

- That the appellant failed to service the said machine;
- That it failed to have any regard to the environment where the plaintiff worked to ensure that it was safe;
- That it exposed him to injury or harm;
- That it failed to provide him with working apparatus; and
- That it allowed workers like him to operate a defective machine.

In its written statement of defence, the appellant denied employing the respondent. It further denied that any accident occurred on the said date. All particulars of negligence were accordingly denied. Without prejudice, the appellant pleaded that if an accident occurred as alleged, then the same was not due to its negligence or breach of duty but was due to the sole or contributory negligence of the respondent particulars whereof it pleaded. Again without prejudice, the appellant pleaded that in accepting its employment, the respondent freely accepted to run the risk of accidental harm foreseeable, connected with and / or incidental to such employment. It accordingly sought to rely upon the doctrine of *volenti - non fit injuria*.

At the trial before the learned Chief Magistrate, **Solomon Wamwayi**, the respondent testified and called one witness, **Dr. Samuel Aluda** (P.W.2). His case was that on the material date, he was working on a twisting machine of the appellant when a metal took hold of his left index finger and cut it. A driver of the appellant took him to hospital. Later, he was examined by **Dr. Aluda** who prepared a medical report of his injuries. He blamed the appellant for the accident because he was not given gloves. **Dr. Aluda** produced his report and receipt for Kshs 1,500/=. He testified that the respondent sustained a deep cut wound on the left in his left index finger about 3 cm long.

The appellant offered no evidence at the trial but submitted, inter alia, that there was no proof of employment or negligence. On quantum, the appellant opined that an award not exceeding Kshs 40,000/= would adequately compensate the respondent.

On his part, the respondent contended that he was indeed the appellant's employee and was, at the material time, injured while in its employment and due to the negligence of the appellant. On quantum, it was submitted on behalf of the respondent that an award of Kshs 120,000/= general damages would adequately compensate him.

The Learned Chief Magistrate analyzed the evidence before him and concluded that the appellant was 80% liable in negligence and assessed general damages for the respondent at Kshs 64,000/= after taking into account his own contribution of 20% negligence.

That decision provoked this appeal. The appellant has put forward seven (7) grounds of appeal which raise the following issues:-

- 1). That the respondent did not prove that he was an employee of the respondent;
- 2). That the respondent failed to prove negligence on the part of the appellant;
- 3). That damages awarded were inordinately high as to amount to an erroneous estimate of the damages suffered by the respondent.

When the appeal came up before me for hearing on 27th March, 2012, counsel agreed to file written submissions which were in place by 3rd July, 2012. The appellant reiterated that indeed, the respondent had not, on a balance of probability, proved that at the material time, he was employed by the appellant and that the appellant had been negligent.

On behalf of the respondent, it was submitted that employment and negligence were proved on a balance of probability and that the appellant was found properly liable.

I have considered the record, the grounds of appeal and the submissions of counsel. Having done so, I take the following view of this appeal. This is a first appeal. That being the case, I should subject the evidence which was adduced before the Learned Chief Magistrate to a fresh scrutiny and arrive at my own independent conclusion. As I do so, I bear in mind that I did not see or hear the witnesses testify and should make allowance for that. (See *Selle and Another –vrs- Associated Motor Boat Company Limited and Others* [1968] E.A. 123). It is also trite that I am not necessarily bound to follow the trial court's findings of fact if it appears that the court failed to take into account particular pertinent circumstances or if the impression based upon the demeanor of witnesses is inconsistent with the evidence adduced. (See ***Abdul Hameed Seif –vrs- Ali Mohamed Shoran* [1955] 22 EACA 270**. I also keep in mind the principle enunciated in ***Peters –vrs- Sunday Post Limited* [1958] E.A. 424** which was expressed as follows:-

“It is a strong thing for an appellate court to differ from the findings on question of fact of the judge who tried the case and who had had the advantage of seeing and hearing the witnesses. But the jurisdiction (to review the evidence should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion.”

On the above principles, his court may only interfere with the trial court's findings of fact if the findings were based on no evidence or on a misapprehension of the evidence or if it is shown clearly that the trial court acted on wrong principles in reaching those findings. (See **Ephantus Mwangi and Another – vrs- Wambugu [1982-84] 2 KAR 100**).

First, was the respondent at the material time an employee of the appellant/ he testified at the trial that he indeed was. He even indentified **Wanjala** as his supervisor to whom he reported the said accident. His testimony was not controverted by the appellant since it offered no evidence at the trial. Proof of employment was only on a balance of probability and in my judgment; the respondent duly discharged his burden.

With regard to negligence, the respondent pleaded, among other things, that the appellant failed to provide him with any working apparatus. At the trial, the respondent testified that, he blamed the appellant for the accident as he was not furnished with gloves. In cross-examination, the respondent stated as follows:-

“Gloves are necessary so that the injuries are minimized. It is not true that we were given gloves. It is not true that I refused to wear gloves and follow safety rules.”

So, clearly the respondent pleaded negligence and demonstrated one of the particulars of negligence pleaded. That was the only evidence which was placed before the learned Chief Magistrate. The appellant did not give its version of the accident. This case is clearly distinguishable from the case of **Amalgamated Saw Mills Ltd –vrs- Tabitha Wanjiku [2006] e K.L.R** where rebuttal evidence was adduced. The case of **Mwanjale –vrs- Said t/a Jomvu Total Service Station** were involved facts that are completely at variance with facts herein. It is therefore clearly distinguishable from this case. In the premises, I find and hold that the respondent proved, on a balance of probability, that the appellant was negligent. There was therefore basis for finding that the appellant was 80% liable in negligence.

With regard to damages, this is what the Learned Chief Magistrate stated:-

“Having considered the authorities cited, And the injuries sustained which injuries were soft tissue injuries and which have healed without deformities I do award the plaintiff Kshs 80,000/= as general damages for pain suffering less 20% contribution which comes to Kshs 64,000/=.”

Although the appellant alleged in its grounds of appeal that the damages awarded were inordinately high as to amount to a gross estimation of the injuries sustained, the submissions made on its behalf did not address the quantum of damages.

On principles applicable, the Court of Appeal stated as follows in **Kemfro Africa Limited t/a Meru Express Service, Gathogo Kanini –vrs- A.M. Lubia & Olive Lubia [1982 – 88] 1 KAR 727 at page 730:-**

“The principle to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the judge in assessing the damages took into account an irrelevant factor, or left out of account a relevant one or that, short of this, the amount is so inordinately low, or so inordinately high that it must be a wholly erroneous estimate of the damages. See Ilango –vrs- Manyoka [1961] E.A 705; 709; 715; Lukenya Ranching & Farming Co-operative Society Ltd –vrs- Karokoto [1970] EA 414, 418, 419.”

I have reconsidered the judgment of the Learned Chief Magistrate and do not detect consideration of a factor which ought not to have been considered or failure to take into account a factor which ought to have been considered. I have also not detected application of wrong principles. Finally, I am not persuaded that the award made by the Learned Chief Magistrate is so inordinately high as to suggest an erroneous estimate of the damages.

To the contrary, the Learned Chief Magistrate took into account all relevant factors and did not take into account any irrelevant factors.

In the end, I do not find any merit in this appeal which I accordingly dismiss with costs.

It is so ordered.

DATED AND DELIVERED AT ELDORET

THIS 31ST DAY OF JULY, 2012.

**F. AZANGALALA
JUDGE**

Read in the presence of:-

Mr. Namiti for the appellant.

**F. AZANGALALA
JUDGE.**