



ELDORET STEEL MILLS LTD.....APPELLANT

VERSUS

KENNEDY KEDOLOLO.....RESPONDENT

(Being an appeal from the judgment and decree of Hon. Mrs. M.K. Nyakundi Senior Resident Magistrate in Eldoret SPMCCC No. 1520 of 2003 delivered on 14th April 2005)

JUDGMENT

The Appellant presented a Memorandum of Appeal dated 28th April 2005 appealing from the judgment and decree of the learned Senior Resident Magistrate Mrs. M.K.. Nyakundi delivered on 14th April 2005 in SPMCCC No. 1520 of 2003 wherein the Appellant was the defendant and the Respondent the Plaintiff. The appeal was preferred on the following grounds:-

- 1. THAT the learned trial magistrate erred in law and in fact in awarding damages whereas the Plaintiff had not proved his case.**
- 2. THAT the learned trial magistrate erred in law and in fact in ignoring and/or failing to consider the submissions of the defendant and its exhibits without proper reason to do so.**
- 3. THAT the learned trial magistrate erred in law and in fact in awarding damages which were inordinately excessive in the circumstances.**
- 4. THAT the learned trial magistrate erred in law and in fact in shifting the burden of proof to the defendant contrary to the law.**

The Respondent had sued the Appellant for failing to provide a safe system of work and protective gear. That on 1st October 2003 while so employed the Respondent was injured in the course of his employment. The Respondent averred that the Appellant was in breach of the duty of care and thus of negligent and further that the Appellant was in breach of statutory duty. The Respondent averred that he suffered injuries as follows:-

- The right eye was tender red, sore and tearing and could not see properly.
- Severe pain incurred during and after the injury.
- The appeal was admitted to hearing on 3rd April 2008.

The Appellant filed a defence and denied liability and averred contributory negligence on the part of the Respondent. Hearing of the case proceeded before Senior Resident Magistrate M.K.N. Nyakundi. The Respondent gave evidence and stated that he was injured while on duty. He worked as machine operator and when steel was being pulled to the machine for cutting it hurt his eye. He went to personnel and was

given money to see a doctor. He went to Moi Referral and Teaching Hospital. That his right eye had healed but he could be where there is a lot of light. After PW1 had testified the case was adjourned. On 13th January 2005 the parties recorded consent on liability in the ratio of 25:75 against the Appellant. Further the documents marked earlier as PMFI – 1(a) and (b) and P MFI – 2(A) and (b) be produced as Plaintiffs exhibit 1(a) and (b) and 2(a) and (b). The Plaintiff then closed his case.

Dr. Z Gaya's report dated 13th August 2004 was produced by consent as defence exhibit 1. The defence then closed its case. Parties then took a mention date for submissions. In a judgment delivered on 14th April 2005 the learned trial magistrate held that a sum of Kshs. 180,000 would be awarded to the Respondent as general damages for pain and suffering. Subject to the apportionment of liability judgment was entered for the Respondent against the Appellant in the sum of Kshs. 136,500 together with interest and costs. It is this award that promoted this appeal.

Counsel for the Appellant and Respondent made oral submissions before me on 29th July 2008. Counsel for the Appellant abandoned grounds 1 and 4 in the Memorandum of Appeal. The appeal was therefore contested on the question of quantum. In brief, counsel for Appellant submitted that the award of Kshs. 180,000/= was inordinately high as to show that the trial magistrate had misdirected herself. That the learned trial magistrate did not properly appreciate the case of **Stephen Mureithi Wahome v Peter Njoroge Gathuri & others HCCC 3579 of 1985 (Nairobi)**. In this case the Plaintiff was a student aged 14 years who suffered injury to the left eye, multiple bruises on left perinatal region multiple soft tissue injuries. He was hospitalized for two days during which was found to have a traumatic lateral recus in the left eye leading to squint in that eye. His vision was reduced; there was an outward visible deformity towards the right eye and generalized weakness in the left side of the body. The injured eye muscle recovered well. The Plaintiff was awarded Kshs. 150,000/= general damages for pain, suffering and loss of amenities. Judgment was dated 26th October 1989. The Appellant contends that the injuries in the **Stephen Wahome** case were more severe and therefore not proportionate to the injury suffered by Respondent.

I have reviewed the evidence adduced at the trial court as I am entitled to do, this been a first appeal. I gather that the opinion of the doctor (Plaintiff exhibit 2a) was that the injuries sustained were severe and are continuing to heal but for pains in the right eye which subside with use of analgesics. The opinion of the doctor was that the Respondent could not see clearly with right eye and that a proper prognosis would be made at later stage. Defence Exhibit 1 was a medical report from Dr. Z Gaya. In his opinion the injury to the right eye that occurred on the 1st October 2003 has recovered well with the ability to resume to normal visual acuity. The difference of recovery is attributed to the date of examination. The Respondent was examined by his doctor on 9th October 2003 whereas he was examined by the Appellant's doctor on 13th August 2004. The passage of time would have led to the reasons for the remarkable healing.

In the **Stephen Wahome** case the injury had also recovered. The judgment was a 1989 judgment. The trial magistrate did her best in the estimation of general damages. Counsel for the Respondent had urged Kshs. 200,000/= while counsel for Appellant had urged Kshs. 120,000/=. There was a difference of Kshs. 80,000/= between the parties. The trial magistrate reduced the difference to Kshs. 60,000 by awarding Kshs. 180,000/= for pain and suffering and loss of amenities. The principle of law while dealing with appeals on quantum is that an appellate court should not interfere unless it is shown that the award was excessive as to be out of touch with awards in similar circumstances. A difference of Kshs. 60,000/= does not seem to me to be such an award that can be said to be out of touch with awards in similar circumstances.

I find and hold that the learned trial magistrate did not misdirect herself. The upshot is that the appeal lacks merits and is hereby dismissed with costs to the Respondent. It is so ordered.

Dated AND SIGNED at Nairobi this 22nd day of AUGUST 2012.

M.K. Ibrahim

Judge

DATED AND Delivered At Eldoret on This 26TH Day Of SEPTEMBER 2012.

ABIGAIL MSHILA

Judge

In the presence of: Okoth for Appellant

N/A for the Respondent