



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL 46 OF 2010**

(Appeal from the judgment and decree of the Principal Magistrate Hon. E. C. Cheroni in Webuye Court in Civil Case No.22 of 2008)

**GILBERT ODHIAMBO OWOUR .....APPELLANT**

**~VRS~**

**NZOIA SUGAR COMPANY LTD.....RESPONDENT**

**JUDGMENT**

The evidence before the trial court was clear that on 17/12/2007 the Appellant was a casual employee of the Respondent in the Marketing and Finance Department. His work was to load 50 kg sugar into lorries from the warehouse. The bags would be brought from the warehouse on a conveyor belt. In the lorry, the Appellant and others would pick the bags on the conveyor belt and arrange them. The conveyor belt was hanging into the lorry from the warehouse. A bag fell from the conveyor belt onto the Appellant's left foot and injured him. The Appellant and the other casuals on duty had not been provided with any protective gear. It was the Respondent's policy not to provide them. The Respondent had a statutory obligation to provide a safe working environment to its employees. If these casuals were using hands to lift and carry 50 kg bag of sugar from a conveyor belt into a lorry and load them there was always a risk of a bag falling and injuring one. The Respondent had the responsibility of minimizing the risk and the extent of the injury by providing protective gear, including gloves, boots and head gear. The responsibility was not discharged.

What happened on this day was that the conveyor belt delivered 2 bags that were torn. The Appellant returned them and expected the people in the warehouse to replace the bags. The belt came with the two replacement bags which he took. Unfortunately for him, the people in the warehouse had given three instead of two bags. When he took the two, he did not expect this third one. It was the one that fell on him and injured him. There was certainly negligence on the part of the people in the warehouse who had loaded this third bag on the conveyor belt and had not warned the Appellant. The Respondent would be vicariously responsible for the accident.

The trial court was correctly faulted by the Appellant for dismissing his suit with costs. It found that the Respondent did not breach any statutory duty and was not negligent and therefore was not liable to compensate the Appellant for the injuries suffered. The foregoing shows that the findings were not supported by the evidence. The Respondent was 100% liable and should compensate the Appellant for the injuries suffered.

Regarding the amount payable for the injuries, the trial court awarded Ksh.20,000/= which the Appellant complains was inordinately low given the circumstances. He proposed Ksh.100,000/=. This

court can only disturb the quantum of damages awarded by the trial court if it can be shown that the court took into account an irrelevant factor, or left out of account a relevant one, or the amount is inordinately low or so inordinately high that it was wholly erroneous estimate of the damage (**Kemfro Africa Ltd t/a Meru Express Service v. Lubia & Another [1982-88] 1 KAR 777**). All that the trial court observed was:

*“Could I have found the defendant liable, I would have awarded damages for pain and suffering in the sum of Ksh.20,000/=. Otherwise this suit is dismissed with costs.”*

There is no indication that the injuries suffered and their effect were taken into consideration in reaching the amount. The authorities that had been cited were not considered.

What were the injuries? The Appellant suffered swollen and tender left foot and ankle and was in severe pain. He was taken to the Respondent’s clinic where he was treated as an outpatient and was discharged. He was then admitted at Lugulu Friends Hospital for one day. Treatment included x-ray, application of a firm bandage, antibiotics and analgesics. When he was examined by Dr. S. I. Aluda (MD) on 6/2/2008 he complained of pains in the injured region and limited movement of the left ankle joint. On examination there was tenderness in the left leg ankle and foot and there was limited movement in the left ankle joint. The doctor’s opinion was that the injury sustained was severe but he was continuing to heal and the pains were going to subside with the use of analgesics. The limited movements in the left ankle joint would be relieved by physiotherapy. In short, the Appellant suffered soft tissue injuries that caused him severe pain and limited ability to use the left ankle and foot for a considerable period. Ksh.20,000/= was inordinately low in the circumstances. I determine that Ksh.50,000/= in general damages would serve the interests of justice in this case. Special damages were agreed at Ksh.1,500/=.

I allow the appeal and set aside the judgment of the lower court. In its place there shall be judgment for the Appellant against the Respondent in the sum of Ksh.51,500/= together with costs and interest. Costs of the appeal shall be borne by the Respondent.

Dated, signed and delivered at Bungoma this 19<sup>th</sup> day of September, 2012.

**A. O. MUCHELULE**  
**JUDGE**