



**REPUBLIC OF KENYA**

**High Court at Eldoret**

**Civil Appeal 5 of 2006**

**ELDORET STEEL MILLS LIMITED.....APPELLANT**

**VERSUS**

**JANE RODAH ADTHINGA.....1<sup>st</sup>  
RESPONDENT**

**PATRICIA ATIENO OCHIENG suing as dependants of**

**KENYA OSURU OCHIENG (deceased)**

**.....2<sup>nd</sup> RESPONDENT**

***(Being an appeal from the judgement and decree of the Honourable W. N. Njage Principal Magistrate in Eldoret CMCC. No. 1302 of 2003 delivered on 18<sup>th</sup> day August 2005)***

**JUDGEMENT**

The Respondent presented a suit at the Chief Magistrates Court at Eldoret seeking general and special damages in respect of fatal accident that occurred on 16<sup>th</sup> March 2001. The Respondents were suing as the dependants of Osuru Ochieng’ who used to work with the Appellant as foreman and Boiler Operator. It was averred that the deceased used to inhale considerable concentration of fumes from which he died on 16<sup>th</sup> March 2001. The particulars of negligence and/or breach of statutory duty were pleaded as failing to take any or any adequate precautions for the safety of the deceased while he was engaged in the said work; exposing the deceased to a risk of damage or injury of which the defendant its agents and/or servants knew or ought to have known; failing to provide the deceased with protective masks and/or take any or any practicable measures to protect the persons working at the manufacturing process, including the deceased against inhalation of dust and fumes; causing or permitting the deceased to be exposed to excessive continuous inhalation of fumes when the defendant, its agents and or servants knew or ought to have known that such exposure was injurious to his health; causing or permitting the deceased to be exposed to substantial quantities of fumes and to inhalation of the same when the defendant knew or ought to have known that such inhalation was injurious to the deceased; and failing to provide or maintain any or any proper safe system of work.

The Appellant was served and filed a defence denying liability. It averred that it took all precautions to ensure safety of its employees and denied that the deceased was its employee. The Appellant pleaded in the alternative that the deceased was contributorily negligent and pleaded particles of negligence in paragraph 6 of the defence. The case was heard by Honourable W.N. Njage who in a judgment delivered on 18<sup>th</sup> August 2005 entered judgment for the Respondent for loss of dependency in the sum of Kshs. 394,080/= together with interest and costs. The Appellant was aggrieved and lodged a Memorandum of

Appeal contending that:

1. The Learned Trial Magistrate erred in law and in fact in holding that the deceased died as a result of an occupational disease contracted while in the course of employment with the Appellant without any evidence in that regard.
2. The Learned Trial Magistrate erred in law and fact in holding the Appellant liable for negligence and or breach of statutory duty and contract of employment contrary to the evidence on record.
3. The Learned Trial Magistrate erred in law and in fact in ignoring the evidence on record.
4. The Learned Trial Magistrate erred in law and in fact in awarding damages to the Respondents which were in any event not specifically proved and were excessive in the circumstances.
5. The Learned Trial Magistrate erred in law and in fact in ignoring the Appellant's submissions in his judgment without any proper reason to do so.

The Appellant prayed for the judgment and decree to be set aside and for the suit to be dismissed with costs.

On the hearing of the appeal counsel for the Appellant submitted that there was no evidence that the deceased died of an occupational disease. That it was impossible to tell cause of death. That the deceased died of natural causes. That the Appellant was not negligent. Dust coat had been provided. That there was no evidence that the deceased was a non-smoker. There was no medical report to show his health condition. Evidence on record showed that no one had died of inhaling gasses. On grounds 4 and 5 he submitted that damages were not proved and were excessive. That the trial court did not consider section 35 of the Workmen Compensation Act. Medical practitioner must grant certificate that the workman incurred the disease from his employment.

Counsel for the Respondent opposed the Appeal. He submitted that the main cause of death was liver cirrhosis. Causes could be changes in metabolism; alcohol consumption; and could not rule out inhaled toxic substance. He spent ten years in factory. DW1 gave testimony that the boiler used electricity and oil. Appellant was negligent and did not provide any protective gear against inhalation. That no gas masks were provided. That there was no error in assessing loss of dependency. Counsel urged that the appeal be dismissed.

I have considered the respective submissions of counsel and what is in issue is whether the cause of death was an occupational disease as a result of inhaling boiler fumes. The second issue is whether the damages awarded for loss of dependency were proved and lastly whether the damages for loss of dependency were excessive. The duty of this court on a first appeal is to re-evaluate the evidence and test the findings of the trial magistrate taking into account that this court did not have the benefit of watching the witnesses. The gist of this case revolves around the testimony of PW3. PW1 and PW2 were simply dependants and did not know the cause of death. PW3 gave testimony that she did post mortem on the body of Kenya Osiur Ochieng' aged 50 years. She found disease of the liver.

The deceased had superficial dilation of the oesophagus and stomach. They ruptured and caused fatal bleeding. There was a lot of blood in the oesophagus. He had a lot of blood in the intestine. The immediate cause was loss of blood. The deceased was suffering from high blood pressure. The main cause was liver cirrhosis. This was liver failure. Causes could be due to hepatitis, deep change in metabolism, alcohol consumption and she could not exclude as she was informed he spent ten years in factory and could have inhaled toxic substances. She did not find any traces of toxic substances. It was impossible to tell what was the cause of death.

The Trial Magistrate summarized the evidence and made the following finding:

***“The defence called no medical evidence to controvert the evidence by Professor Koslova that the***

***deceased sickness could have been caused by inhalation of toxic substances at the factory. I therefore find that the plaintiff has proved his case against the defendant on a balance of probabilities and do find for the plaintiffs on liability against the defendant 100%.”***

With due respect to the trial magistrate he erred in assessing the evidence of PW3. PW3 was clear that the deceased had a medical condition which was High Blood pressure. High blood pressure could have caused liver cirrhosis – liver failure. She was informed that the deceased worked at a factory for ten years. She stated that inhalation of toxic fumes could lead to liver failure but in the case of the deceased she did not find any traces of toxic fumes. One would have expected high levels of toxic fumes given the length of time that the deceased is alleged to have been exposed to inhalation of fumes.

The fact of the matter as PW3 put it was not possible to tell the cause of death. Without proof of cause of death the plaintiff’s case would fail automatically. There was no case for the defendant to rebut. It was therefore a misdirection on the part of the trial magistrate that the evidence of PW3 was not rebutted. Grounds 1 to 3 of the appeal succeed. It is unnecessary to consider grounds 4 and 5. But assuming that I am wrong on liability, I would not disturb the award of loss of dependency. PW1 and PW2 adduced evidence to show that they were dependants. The Deceased was employed by the Appellant earning a monthly salary. The Trial Magistrate applied the correct dependency ration of 2/3 and a multiplied Kshs. 9852/- which was the proved salary from the pay slip. The multiplier of 5 years was reasonable. Grounds 4 and 5 would therefore have failed.

For the aforesaid reasons, I set aside the Judgment of Honourable W.N. Njage delivered in C.M.C.C. No. 1302 of 2003 on 18<sup>th</sup> August 2005 substitute the same with an order dismissing the Respondents’ suit with costs. The Appellants will have costs of this Appeal. It is so ordered.

DATED AND SIGNED AT NAIROBI ON THIS 16<sup>TH</sup> DAY OF AUGUST 2012

**M. K. IBRAHIM**  
**JUDGE**

DATED AND DELIVERED AT ELDORET ON THIS 31<sup>ST</sup> DAY OF OCTOBER 2012

**F. AZANGALALA**  
**JUDGE**

In the presence of: Mr. Okoth for Appellant

Mr. Khaya h/b brief for Mr. Ombati for Respondent