



**REPUBLIC OF KENYA**

**High Court at Eldoret**

**Civil Appeal 24 of 2003**

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

**VERSUS**

**BENARD ASIKOYE.....RESPONDENT**

***(Being an appeal from the judgement and decree of the learned retired Chief Magistrate Solomon Wamwayi in Eldoret CMCC. No. 615 of 2001 dated and delivered on 26<sup>th</sup> February 2003)***

**JUDGEMENT**

The Respondent presented a Plaint at the Chief Magistrate's Court at Eldoret claiming both general and special damages for an injury suffered at work on 20<sup>th</sup> August 2000. The Respondent blamed the Appellant for exposing the Respondent to a risk of injury or damage; failing to advise or train its workers on the safe and proper use of the machine; failing to ensure that where the Respondent carried out his work was safe and failing to provide the Respondent with protective gear. The Respondent averred that he suffered burns injury on the right lateral tibia fibula grade 3 and injury to the abdomen. The Appellant was served and filed a defence denying liability and in the alternative attributing contributory negligence to the Respondent and provided particulars of negligence in paragraph 5 of the defence. The case was heard by the Chief Magistrate S. Wamwayi who delivered judgment on 26<sup>th</sup> February 2003 in favour of the Respondent awarding Kshs. 150,000/= as general damages and 100% liability against the Appellant. The Appellant was aggrieved by the judgment and decree and lodged a Memorandum of Appeal contending that:

1. The learned magistrate erred in law and in fact in finding the Appellant 100% to blame in negligence for the injuries suffered by the Respondent;
2. The learned magistrate erred in law and fact in finding the Appellant liable at all in negligence for the damage suffered by the Respondent;
3. The learned magistrate erred in law and fact in making an award that was so excessive as to amount to an erroneous estimate of the damages suffered.

At the hearing of the appeal counsel for the Appellant argued the grounds 1 and 2 together. He submitted that the finding of 100% liability was erroneous. There was no evidence that the place of work was not safe. The Respondent had worked for 12 years. The Respondent did not prove case on a balance of probability. On ground 3 he submitted that the award of Kshs. 150,000 was excessive as to amount to an

erroneous estimate of the damage suffered. That the doctor testified that the injuries were soft tissue injuries. He urged that the award be reduced to Kshs. 50,000/= that the half the decretal amount deposited in joint account be released to the Appellant and other half paid be recovered through proceedings.

Counsel for the Respondent opposed the appeal. She submitted that the Appellant did not call any evidence to rebut the evidence of the Respondent. That the Appellant was negligent for failing to provide protective gear. There was no evidence to prove that the Respondent was negligent. Amount awarded as general damages was fair and reasonable. The Appellant has not demonstrated that the Magistrate committed an error of principle She submitted that the Appellant did not file any submissions and therefore did not provide any counter offer to guide the magistrate. She urged that the appeal be dismissed and the balance of the decretal amount be released to the Respondent.

I have considered the respective submissions of counsel and I take the view that the appeal raises two issues for determination. (1) Whether the trial magistrate was in order to make a finding of 100% liability against the Appellant and (2) whether he award of Kshs. 150,000/= was excessive for the nature of injuries suffered. It is the duty of this court to re-evaluate the evidence on record and to test the findings of the trial magistrate whether they are sound on facts of course giving an allowance to the fact that this court has not had the advantage of watching the witnesses. The evidence of the Appellant was as follows:

***“I started working. I tried to feed metal in the machine and the machine rejected it. One Mohin Singh told me to hold the metal. The machine took the metal with a lot of force and it again rejected the metal and the metal fell down and hit my leg and my right leg was burnt. I went to Moi Referral Hospital for treatment...I blame the Defendant as the Defendants machine was defective. On that day, I was not given a sack to tie around my leg. If i had tied a sack on my legs, the fire could not have reached me. It is not true that I was not careful”***

On cross examination he stated that he was unable to work for two weeks after the injury. It is not true that he was not careful. When he fed the metal in the machine, he thought that it had taken it. The metal came out and it fell on his right leg and he was injured. He was treated and discharged. He had healed. The doctor who attended to the Respondent on 20<sup>th</sup> August 2000 gave testimony as PW2 and produced the medical report as P Ex 1. He formed the opinion that the Respondent had suffered soft tissue injuries.

The trial magistrate considered the evidence as follows:

***“The Plaintiff denied the Defendants suggestion that he was negligent and therefore to blame for the accident. The Defendant did not adduce any evidence to dispute the Plaintiff’s version of the event that led to the accident. I do find that the Defendant was negligent in exposing the Plaintiff to a defective and dangerous metal machine...I do consider the injuries here to be serious and the pain to have been excruciating. Doing the best I can, I do award the Plaintiff Kshs. 150,000/= as general damages for pain and suffering.”***

I totally agree with the findings of the trial magistrate on liability. This court would not have come to a different conclusion. The machine must have been faulty. Otherwise it would taken the metal in the ordinary manner. There was no evidence from Defendant to show that the Respondent deliberately put his leg to be knocked or that he saw the metal bar likely to fall and failed to remove his leg. Grounds 1 and 2 of the appeal therefore fail.

On the question of quantum counsel for the Appellant had asked for shs. 250,000/=. The trial magistrate awarded shs. 150,000 based on what he felt as pain and suffering suffered by the Respondent. Being hit with a metal bar could lead to excruciating pain. This court did not observe the Respondent testify it cannot therefore capture who the feelings of pain were communicated to the trial magistrate. In order to disturb an award of damages by a trial court the Appellant must show that there is an error of principle that was committed. The Appellant has complained generally that the award was high. No case law was provided to support the contention. Excessiveness can only be judged in comparison with comparable awards. The award of general damages is a matter of discretion to be exercised judiciously. An appellate court will not interfere with the exercise of discretion of a trial magistrate unless the usual circumstances

outlined in ***Mbogo v Shah*** exist. For these reasons ground 3 also fails.

The upshot is that this Appeal lacks merit and is hereby dismissed with costs. The balance of the decretal amount held in joint account to be released to the Respondent. It is so ordered.

DATED AND SIGNED AT NAIROBI ON THIS 8<sup>TH</sup> DAY OF AUGUST 2012

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

DATED AND DELIVERED AT ELDORET ON THIS 17<sup>TH</sup> DAY OF OCTOBER 2012

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

In the presence of: Mr. Yego h/b for Mr. Sungik for Appellant.