



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CIVIL APPEAL NO.233 OF 2007**

**VALLEY BAKERY LIMITED.....APPELLANT**

**VERSUS**

**GEORGE OMONDI AKINYI.....RESPONDENT**

**[An Appeal from the Judgment/Decree of Hon. W. M. Kagendo, Senior Resident Magistrate**

**in Nakuru C.M.C.C.No.1629 of 2006 dated 3<sup>rd</sup> December, 2007]**

**JUDGMENT**

This is an appeal arising from the decision of W. Kagendo, Senior Resident Magistrate in which she awarded to the respondent (who was the plaintiff before her) Kshs.42,500/= in general and special damages for the injuries sustained by the respondent while working in the appellant's bakery. The appellant has challenged the decision on the ground that there was no evidence that the respondent sustained the injuries while on duty.

Before considering these grounds, it is necessary to evaluate the evidence on record afresh for this court to arrive at its own independent conclusion. In doing so, two things must be borne in mind; one, that the court must appreciate that it has not seen or heard the witnesses and two, that that being the case, as an appellate court, it will not normally interfere with a finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the trial court is shown to have acted on wrong principles in reaching its finding. See **Mukuba** Vs. **Nyawira** (1983) KLR 403.

The respondent testified that on 20<sup>th</sup> February, 2005 while pushing a trolley loaded with loaves of bread, the wheels of the trolley hit a pothole causing the trolley's wheel to come off and the trolley to fall on him injuring his right knee. He blamed the appellant arguing that the appellant was negligent for failing to

ensure his (the respondent's) safety at work by providing him with a faulty trolley and for failing to issue him with proper and safe apparel.

The appellant on the other hand denied that the respondent was its employee; it further denied the occurrence of the accident as claimed by the respondent. On a without prejudice basis, the appellant averred that if the respondent was injured, then he either solely or substantially contributed to its occurrence by failing to have due regard to his own safety, exposing himself to a danger or injury which he knew or ought to have known and by himself being negligent.

The appellant called the evidence of a supervisor in the section where the respondent was working, **D.W.1, Thomas Osero**, who confirmed, contrary to the appellant's defence, that the respondent was indeed an employee of the appellant; and that he was infact on duty on the day of the alleged accident. He, however, denied that the respondent was injured. **D.W.2, Joseph Ongale Apondi**, the Transport and Security Manager testified that from his record, the respondent did not report any accident.

The learned trial magistrate found that the appellant was negligent hence the award of Kshs.42,500/=. It is not in doubt now that the respondent was an employee of the appellant; that he was on duty on the date of the alleged accident. The only questions regarding liability that fell for determination and which is at the centre of this appeal is whether the respondent was injured while at work and whether the appellant was negligent.

It was the respondent's evidence that he was injured as a result of the potholes and a defective trolley. The appellant through **D.W. 1 Thomas Osero** denied that the trolley was defective. Thomas Osero testified that he maintained the trolleys and kept their record of maintenance. He, however, did not produce the record.

The learned trial magistrate weighed the rival evidence and noted that the respondent was a truthful witness and observed that his demeanour was impressive. She on the other hand dismissed the evidence of the two witnesses called by the appellant. I have no basis for making a contrary finding from that of the learned magistrate on liability. No evidence was presented to rebut the respondent's claim that the wheel fell off due to potholes on the ground. In the normal course of things, wheels do not just fall off. They must have been defective.

The second issue regarding liability was about the respondent's initial treatment. According to the respondent, after he suffered the injury, he informed his supervisor, Osero (who must be **D.W.1 – Thomas Osero**) who took him to St. Peter's Clinic in Free Area. Osero did not say anything about this, while **D.W.2, Joseph Ongale Apondi** stated that according to his records, the respondent's injuries were not recorded.

Starting with the last issue, DExh. 2, a record of reported accident was incomplete. The entire register ought to have been produced. A single page of a record which was admitted not to list the accidents sequentially cannot be a true reflection of the events.

On the treatment record, it is apparent that treatment notes from St. Peter's Clinic were marked but not

produced. That cannot be a fatal omission as their existence was confirmed by the mere fact that the trial court saw them. In addition, both the doctors who examined the respondent also saw them and made reference, in their respective reports, of them. I find, like learned magistrate that the appellant was negligent as a result of which the respondent suffered injuries to his knee.

The next question is on quantum. The learned magistrate noted that the respondent only suffered soft tissue injuries. She considered the respondent's proposal of Kshs.150,000/= and that of the appellant of Kshs.20,000/= and relying on cited authorities awarded Kshs.40,000/=. The trial magistrate in arriving at this award applied the correct and normal principles of assessment of damages, namely that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct levels of awards in similar cases. See **Stanley Maore** Vs. **Geoffrey Mwenda**, Civil Appeal No.147 of 2002

For the reasons stated, there are no grounds for interfering with the findings of the trial magistrate the appeal is dismissed with costs.

**Dated, Delivered and Signed at Nakuru this 1<sup>st</sup> day of February, 2011.**

**W. OUKO**

**JUDGE**