



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL APPEAL NO. 4 OF 2006**

*(Being an appeal from the Judgment of the Senior Resident Magistrate's Court at Kajiado - Mrs Oganyo, SRM dated 8<sup>th</sup> December, 2005)*

DEVKI STEEL MILLS LIMITED.....APPELLANT

**VERSUS**

OTIENO PAUL KADENYO.....RESPONDENT

**JUDGMENT**

This judgment relates to an appeal by the Devki Steel Mills Limited in the above captioned suit in which the Respondent, (then Plaintiff) was awarded Shs. 187,000/= comprising general and special damages. The Respondent was also awarded costs of the suit. Aggrieved with the judgment of the lower court, the Appellant filed an appeal dated 9<sup>th</sup> January 2006, which was forwarded to and received in this court on 2<sup>nd</sup> July 2008. The grounds of the appeal are -

- (1) The learned magistrate erred in holding the Appellant liable;***
- (2) The learned magistrate erred in holding that the Respondent had proved his case on a balance of probability;***
- (3) The learned magistrate erred in holding the Appellant liable, when the Respondent and/or the evidence on record clearly stated/showed otherwise;***
- (4) The learned magistrate erred in holding the Appellant liable without any negligence having been proved on the part of the Appellant;***
- (5) The learned magistrate erred in finding the Appellant in breach of its duty of care towards the Respondent;***
- (6) The learned magistrate erred in holding the Appellant wholly liable or liable at all for the Respondent's injuries;***
- (7) The learned magistrate erred not dismissing the Respondent's claim on grounds of his failure to prove negligence on the part of the Appellant;***

**(8) The learned magistrate erred in awarding general damages of Kshs 180,000/= which are excessive and unjustified.**

and for those reasons, the Appellant prayed that the appeal be allowed and the judgment of the court below be set aside and the Respondent's suit against the Appellant be dismissed with costs in this court and the court below.

The parties filed their respective submissions and lists of authorities on 11<sup>th</sup> February 2010 and 8<sup>th</sup> September 2010 respectively. The appeal raises one basic issue whether the Appellant owed the Respondent the common law duty of care, and whether the Respondent proved its case against the Appellant on a balance of probability.

In their submissions, the Appellant's case is that it discharged its common law duty of care upon the Respondent. The Respondent's counsel submitted otherwise and contended that the learned trial magistrate did not err in her findings that the Appellant did not discharge its duty of care to the Respondent, and find the Appellant negligent and therefore liable.

***"At common law the employer's duty is a duty of care, and it follows that the burden of proving negligence rests with the plaintiff workman throughout the case. It has even been said that if he alleges failure to provide a reasonable safe system of working the plaintiff must plead and therefore prove what the proper system was and in what relevant respects it was not observed."***

*(Winfield and Jolowicz on Tort 13<sup>th</sup> Edn. p. 203 - Employer's liability).*

I have examined and re-evaluated both the Respondent's and Appellant's evidence before the lower court. I have also considered the parties' counsel's written submissions, and set out my findings and conclusions in the paragraphs following.

**Firstly**, the Respondent was an employee of the Appellant. This is common ground as it is admitted by the Appellant in the evidence of DW1, the Assistant Personnel Manager, and the Appellant's sole witness.

**Secondly**, it is also common ground that the Respondent was on duty on the material day. There is no question that he was not injured while at work. He describes in detail the manner in which the accident occurred -

***"... we would put scrap metal into a furnace and it would melt into liquid like porridge. By then the metal was full in the furnace and there was some waste to be removed before proceeding. Then one of the chargers put a pad scrap into the furnace. It burst out .. when I was removing the slag. The chargers would be employed yet they had no experience. The hot pad scrap made me get burnt on my face, neck, stomach, left and right hand and on the legs ... The molten steel splashed on me. We were never given shoes. I was wearing an old overall garment. I had no boots but I was wearing my own shoes. The place I was working in was a danger zone. The steel would melt to 3,500 c - the temperature was very high. It needs garments made of asbestos material, also humors or boots made of asbestos - the material which can withstand the temperature."***

At p. 14 of the Record, the Respondent also describes the working space as being ***"so small for any cases of emergency for one to run away."***

On being asked why his name was not on the medical ledger for July 2002, the Respondent testified that this was because ***"I was not taken out of the industry for treatment."***

This evidence was not displaced by that of DW1 Stephen Mutuku, the Assistant Personnel Manager, who confirmed that the Respondent was working on the material day, and had in fact seen the

Respondent in the morning. Although DW1 produced a record of some of the safety gloves distributed to workers in March 2002, he did not explain why the Respondent was wearing his own shoes and not boots given to him, (*and not merely distributed*), on that day. Even though the temperature of 3,500c stated by the Respondent is exaggerated, a temperature of 850c is still very high. DW1 clearly came out as a person who had no idea that an accident had happened. He was an office man. His evidence was mechanical merely - of what safety systems and materials his company has on paper to be distributed to workers, but no idea of what actually happens or happened on the factory floor or of the accidents which happen, or, happened there in relation to the appellant.

The appellant described what equipment, and clothing a **furnace-hand** is required to have, garment of asbestos, material "**humors**" or boots made of asbestos, not cotton over-all, a helmet of heavy plastic, a **mask** not a bare face. I think the Respondent was lucky to escape with the injuries he suffered in the circumstances under which he was working. It clearly shows that the Appellant had not discharged its common duty of care to his employee and was liable.

An appellate court will interfere with a lower court's decision where it has either applied the wrong principles of law, or awarded excessive or too low a figure of damages, or generally considered matters which it ought not to have considered, or not taken into account or consideration matters which he ought to have considered and in the result arrived at a wrong decision.

Taking into account the above considerations, the award given by the learned Senior Resident Magistrate was reasonable in light of the injuries which he sustained on 1<sup>st</sup> July 2002. The award is neither inordinately high nor inordinately low so as to attract the inference by this court that the lower court took into consideration matters which were irrelevant or applied the wrong principles of law in assessing damages.

In the premises therefore I uphold the judgment of the lower court, and I find no merit at all in this appeal, and dismiss it with costs both here and the lower court.

There shall be orders accordingly.

**Dated, signed and delivered in Nakuru this 11<sup>th</sup> day of March 2011**

**M. J. ANYARA EMUKULE**  
**JUDGE**