



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

**(Coram : F. Azangalala, J.)**

**CIVIL APPEAL NO. 6 OF 2007**

**BETWEEN**

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

**AND**

**LAWI ODHIAMBO AWENDA:.....RESPONDENT**

***(Being an appeal from the decision of the Resident Magistrate Hon. A. B. Mong'are dated 11<sup>th</sup> December, 2006 in Eldoret Chief Magistrate's Court Civil Case No. 1266 of 2001.)***

**JUDGMENT**

This appeal is from the judgment and decree of the Learned Resident Magistrate, **A. B. Mong'are**, dated 11<sup>th</sup> December, 2006 in Eldoret CMCC No. 1266 of 2001. The appellant, **Eldoret Steel Mills Limited**, was the defendant and the respondent, **Lawi Odhiambo Aweda**, was the plaintiff. The Learned Resident Magistrate held the appellant 100% liable and awarded the respondent Kshs. 180,000/- general damages together with costs and interest and thus triggered this appeal.

The respondent had pleaded, *inter alia*, that he had been employed by the appellant and that on or about 3<sup>rd</sup> June, 2001 he was lawfully and diligently performing his duties i.e. offloading some wires from a lorry when a wire which was being so offloaded pierced his hand and thereby caused him severe injuries. He particularised the injuries as multiple cuts on the left hand radio-ulna, cut tendon on 5<sup>th</sup> left finger and multiple cuts on all fingers of the left hand.

In the particulars of negligence the respondent averred, *inter alia*, that the appellant failed to provide or maintain a safe and proper working system; failed to take any or any adequate measure for the safety of the respondent; and failed to provide the respondent with protective gear.

In the written statement of defence, the appellant denied the respondent's claim and averred, *inter alia*, that no accident occurred on the said date and that if such an accident occurred, then the same was wholly occasioned and/or substantially contributed to by the negligence of the respondent.

In its appeal to this court, the appellant has raised four (4) grounds of appeal. The grounds however challenge the Learned Resident Magistrate's award of damages only. The Learned Magistrate's finding on liability is therefore not challenged.

The respondent's case at the trial was that on the material date as he of loaded scrap metal from a

lorry he was cut on his left hand thereby injuring the small finger of the left hand. He was taken to hospital where he was treated and discharged. Later he was examined for a medical report by **Dr. Sirma**. The said report was produced by consent as PEX 2. The findings by the doctor were that the respondent had healed scars on the left hand radio-ulna, multiple healed scars on all fingers, was unable to extend the 5<sup>th</sup> finger of the left hand and had a permanent contracture of the 5<sup>th</sup> finger. The report concluded that the said injury had rendered a permanent disability on the 5<sup>th</sup> finger of the left hand; that the respondent's work performance with the left hand would be compromised; and the scars would remain a permanent feature of the respondent's body.

The respondent blamed the appellant for the accident because it did not give him gloves to work with.

The appellant's case was presented by **Elijah Wanyonyi** (DW1) who at the time of trial was its acting Personnel Officer and **Lyoyd Timona** (DW2) who was its personnel officer at the time of the accident. Both DW1 and DW2, acknowledged that the respondent was an employee of the appellant at the time of the accident. The two however testified about a different date and conflicted on whether the respondent had been on duty or not at the material time. I am not therefore surprised that liability has not been challenged.

The Learned Resident Magistrate found that the respondent had sustained multiple cut wounds on the radio-ulna, and a cut tendon on the 5<sup>th</sup> left finger. She also found that the respondent had multiple cuts on all fingers on the left hand. Her findings were based on the Medical Report produced by **Dr. Sirma** (PEX2) on the injuries sustained by the respondent. The Learned judge also considered a medical report prepared by **Dr. Gaya**. It is not clear how the latter report was admitted but as this record has that report I assume the same was produced by consent. **Dr. Gaya** in his report, indicated that the respondent's left finger is deformed with total loss of function. He consequently assessed the degree of permanent disability at five (5) percent.

The Learned Resident Magistrate on the basis of the respondent's testimony and the two medical reports awarded the respondent the said sum of Kshs. 180,000/- plus costs and interest.

When the appeal came up for hearing before me on 26<sup>th</sup> July, 2011, counsel agreed to file written submissions which were duly in place by 18<sup>th</sup> October, 2011. I have read the submissions and the authorities relied upon by counsel. I have also considered the record of the Learned Resident Magistrate. Having done so, I take the following view of the matter.

The record shows that the Learned Resident Magistrate did not consider the submissions made before her by counsel for the appellant. She expressly stated that the same had not been made. Yet, in this record, the appellant's submissions were date-stamped 27<sup>th</sup> November, 2006. That was before the Learned Resident Magistrate delivered her judgment. The appellant's counsel contended, in the said submissions, that only one injury was sustained by the respondent namely a cut wound on the palmar aspect of the left 5<sup>th</sup> finger which, according to counsel, was a soft tissue injury which healed without any permanent disability. In his view Kshs. 40,000/- would adequately have compensated the respondent.

He relied on the case of **Maina -Vs- Hussein Mohammed Yusuf & Another [HCCC No. 1031 of 1991 Nairobi] (UR)**. In that case the plaintiff who had suffered cut wounds on the right finger and face which had healed leaving a 15% percent permanent disability was awarded Kshs. 55,000/-.

In his submissions before me, counsel for the appellants has placed reliance on three additional cases: **Kilifi Plantations Limited -Vs- Jeth Awuor Odawa [HCCA No. 31 of 2003]** where **Maraga J** confirmed an award of Kshs. 160,000/- awarded to a plaintiff who had sustained cuts on the first and second metacarpophalangeal joints of the first and second fingers of the left hand; **Nduberi Dairy Farmers Co-operative Society Limited -Vs- Boniface Kinyanjui Muthee [Nairobi HCCA No. 624 of 2000] (UR)** where **Visram J**, as he then was refused to disturb an award of Kshs. 100,000/- awarded as general damages to a plaintiff who had suffered amputation of the middle finger; and **Simon Mzee -**

**Vs- Satvinder S. Sekhon [Nairobi HCCA No. 759 of 2003] (UR)** where **Visram J**, as he then was, again refused to disturb an award of Kshs. 150,000/- to a plaintiff who had suffered amputation of the left index finger among other injuries.

The respondent's counsel, on his part submitted that the award of Kshs. 180,000/- made to the respondent was justified given the medical reports produced before the Learned Resident Magistrate.

The principles upon which an appellate court will interfere with an award of damages are settled. The principles were laid down in the **Court of Appeal case of Butler -Vs- Butler [CA No. 49 of 1983.]**

They are: The appellate court will interfere:-

**(a) If the lower court acted on wrong principles.**

**(b) If that court has awarded damages which are so excessive or so low as to represent an erroneous estimate of the damages.**

**(c) If the lower court has taken into consideration matters it ought not to have considered, or not taken into consideration matters it ought to have considered and in the result arrived at a wrong decision.**

Taking those principles into account and based on the evidence which was adduced before the Learned Resident Magistrate, I have come to the conclusion that the award of Kshs. 180,000/- as general damages made to the respondent should be interfered with. I have come to that conclusion, because the Learned Resident Magistrate failed to take into consideration the written submissions made to her by counsel for the appellant. I have also considered the authorities relied upon by the appellant in his appeal. The respondents in those cases suffered far more serious injuries at about the same time and were awarded smaller sums than the respondent herein. In **Kilifi Plantations Limited -Vs- Jeth Awuor Odawa (Supra)**, the plaintiff was awarded Kshs. 160,000/- for cuts of the first and second metacarpophalanged joints of the first and second fingers of the left hand. The doctor observed that the plaintiff had reduced movement of the 2<sup>nd</sup> finger of the left hand resulting in reduced grip of the left hand. In **Ndumberi Dairy Farmers Cooperative Society Limited -Vs- Boniface Kinyanjui Muthee (supra)**, the plaintiff, who had had his middle finger amputated, was awarded Kshs. 100,000/- as general damages and in **Simon Mzee -Vs- Satvinder S. Sekhon (supra)**, the plaintiff, who suffered several injuries including amputation of the left index finger and compound fractures of the third middle phalanged shaft was awarded Kshs. 150,000/- as general damages.

These injuries in the above cases were far more severe than the injuries suffered in the case at hand and also were sustained at about the same time, yet they attracted lower sums than the sum awarded herein. In awarding damages, comparable injuries and awards should always be taken into account.

In the premises, I have come to the conclusion that the award of Kshs. 180,000/- awarded to the respondent as general damages was excessive given the injuries he suffered. The Learned Resident Magistrate failed to take into consideration comparable awards for similar injuries and therefore arrived at an erroneous estimate of the damages. I therefore set aside the said award of Kshs. 180,000/- and substitute there for an award of Kshs. 100,000/-. I have also taken into account the current value of the shilling.

As the respondent has retained more than half of what he was awarded, the fairest order on costs is that each party will bear its own costs of this appeal.

It is so ordered.

**DATED AND DELIVERED AT ELDORET  
THIS 29<sup>TH</sup> DAY OF NOVEMBER, 2011**

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

**Read in the presence of:-**  
**Mr. Barasa H/B for the Respondent.**

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

**29<sup>TH</sup> NOVEMBER, 2011**