



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CIVIL APPEAL NO. 196 OF 2010

RUPA MILLS LIMITED:::APPELLANT

VERSUS

NICHOLAS NGANGA KIMANI:::RESPONDENT

JUDGMENT

The appeal is from the judgment delivered on the 10th September, 2010 by the Honourable I. Maisiba, Senior Resident Magistrate in Eldoret in CMCC NO. 109 of 2010.

The appeal is on both liability and quantum and five grounds of appeal are listed in the Memorandum of Appeal at page 50 of the Record of Appeal.

The five grounds of appeal are as set out hereunder:-

- 1.) **THAT the learned trial magistrate erred in law and in fact in holding the defendant 100% liable despite overwhelming evidence to the contrary.**
- 2.) **THAT the learned trial magistrate erred in law and fact in awarding damages whereas the plaintiff did not prove his case on a balance of probability.**
- 3.) **THAT the learned trial magistrate erred in law and fact in applying the wrong principles while assessing damages**
- 4.) **THAT the trial magistrate erred in law and in fact in awarding damages which were in ordinally excessive in the circumstances.**
- 5.) **THAT the trial magistrate erred in law and in fact in shifting the burden of proof to the defendant contrary to the law.**

The appellants prayer was that the appeal be allowed and the judgment of the 10th September, 2010 be set aside.

Counsel for the Appellant and the Respondent opted to put in written submissions.

A brief summary of the appeal before me is that the respondent was employed as an electrician by the appellant. During the course of his employment the respondent was injured and suffered a cut on his head occasioned by a falling piece of glass.

The appellant was found to be 100% liable for the respondents injuries and the trial magistrate awarded the sum of Kshs. 120,000/- as general damages, proven special damages of Kshs. 1000/-, plus costs and

interest at court rates.

The appellant being aggrieved and dissatisfied with the said judgment presented this appeal.

I find that there are three (3) main grounds of appeal that is number (i) (iii) and (iv) in which relate to the issues of liability, quantum and the application of wrong principles.

On the issue of liability the appellant pleaded the maxim of “*volenti non fit injuria*”. In that the respondent accepted to work without a helmet despite knowing the dangers of working in such conditions. Therefore liability ought to have been apportioned, as suggested by the Appellant at 30% - 70%.

It is submitted that the learned trial magistrate erred in fact and in law by failing to take this into consideration.

The Respondent countered this ground of appeal by submitting that an employer owes an employee a duty of care and it was incumbent on the Appellant to provide the Respondent with a helmet and take such precautions that would make the working place safe for the Respondent. I find that it is not in dispute that the Respondent suffered a cut injury to his head in the course of his employment. It is not in dispute that the Appellant did not provide the Respondent with a helmet.

If the helmet had been provided, maybe the injuries would have been prevented or would not have been as serious.

The authorities annexed to the Appellants submissions do not support his submissions on liability as in one of the authorities, liability is not contested and in the other liability was apportioned “By Consent” of both the parties.

I find that the Appellant had a duty to provide a protective helmet to the respondent which the Appellant did not do.

I find no good reason for interfering with the trial magistrate’s finding on liability and hereby dismiss the appeal on liability.

On the issue of quantum, counsel for the appellant submitted that the trial magistrate used the words “**opposes an award of Kshs. 120,000/-.**”

The trial magistrate then went ahead to award the said sum of Kshs. 120,000/-.

I have read the respondents counsels authority of the Court of Appeal **BUTT -VS- KHAN (1982 - 88)/KAR/** which lays down the principles an appellate court should address when interfering with an award for damages which are:-

“ **i) the court proceeds on wrong principles or
ii) Mis-apprehension of some evidence.....**”

The Appellants counsel did not make any submissions to show that the trial magistrate proceeded on wrong principles or misapprehended some evidence.

The only issue raised related to the choice of words used by the trial magistrate.

I find that the words used by the magistrate were indeed erroneous, but reading the judgment as a whole, I am satisfied that the trial magistrate intended to award general damages and was not “opposed” to granting the same.

I find no good reason to interfere with the trial magistrate’s award for general damages and find that the same is not inordinately high nor excessive nor does it represent an erroneous estimate.

The appeal is hereby dismissed with costs to the respondent.

**DATED AND DELIVERED AT ELDORET
THIS 22ND DAY OF NOVEMBER 2011**

**A. MSHILA
JUDGE**