



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
MILIMANI LAW COURTS
CIVIL APPEAL 610 OF 2004

DEVKI STEEL MILLS LTD.APPELLANT

VERSUS

EVANS BARAZA WALWANDA.....RESPONDENT

*(An appeal from the judgment of Mrs. Owino,
Senior Resident Magistrate's Court at Nairobi)
dated 22nd July, 2004 in Civil Suit No. 8588 of 2003)*

J U D G M E N T

1. The genesis of this appeal is a suit which was filed at the Magistrate's Court in Nairobi by Evans Baraza Walwanda, (hereinafter referred to as the respondent). He had sued Devki Steel Mills Ltd, (hereinafter referred to as the appellant). The respondent's claim was for general and special damages arising from injuries suffered by the respondent during the course of his employment. The respondent claimed that the accident was caused by the negligence and or breach of the terms of employment by the appellant or its servant or agents.
2. The appellant filed a defence to the respondent's claim, in which it admitted that the respondent was its employee and that he was injured in an accident during the course of his employment. However, the appellant denied all allegations of negligence attributed to it maintaining that it observed and complied with all its contractual and or statutory duty of care. The appellant contended that the respondent sustained his injuries as a result of his own negligence in failing or neglecting to follow the directions and instructions given to him and failing to take due care and regard for his own safety. The appellant further pleaded *volenti non fit injuria* contending that the respondent voluntarily placed himself in a position that caused him the alleged injury.
3. During the hearing of appeal before the trial magistrate two witnesses testified in proof of the respondent's case. These were the respondent and Dr. Cyranus Okoth Okere. Their evidence was briefly that on the material day the respondent was working for the appellant as a tongsman on the mills machine. His work included putting iron bars into the machine. On that particular day there was a problem with the respondent's machine. The iron bar left the machine and pierced the respondent's left leg through the heel to the upper part of the leg. The respondent was taken to Kenyatta National Hospital where he was treated for one day. After a month his leg became septic so he had to be admitted at Athi River Medical Services.
4. The respondent blamed the appellant for failing to service the machine. He testified that the machine had not been serviced for two years. When he complained he was abused and threatened and forced to work on the defective machine. Although he was supplied with working shoes, the shoes were worn-out as he had used them for 9 months instead of the recommended 3 months. The respondent also claimed that he was forced to work for 12 hours instead of 8 hours he was supposed to work.
5. Dr. Cyranus Okoth Okere a medical practitioner in Nairobi examined the respondent about a month after the incident and prepared a medical report which he produced in evidence. Dr. Okere noted that the respondent had suffered injuries after being pierced with a hot piece of metal on the right foot, and that he suffered septic wounds. The respondent complained of pains in the right foot and was unable to walk without crutches. Dr. Okere testified that upon examination the respondent had a septic wound on the inner side of the foot and also on dorsal aspect. Dr. Okere's opinion was that the respondent's wound would heal leaving bad scars.
6. At the close of the respondent's case, the appellant conceded to judgment on liability, and the same was recorded by consent

against the appellant at 80%, the respondent bearing 20% contribution. The parties agreed to have another report prepared by Dr. Modi who also examined the respondent produced in evidence. Each party filed written submissions.

7. In his submissions, counsel for the respondent urged the court to award an amount of Kshs.800,000/= as general damages. He relied on **HCCC No.931 of 1988 (Mombasa), Willy Leins vs Leisure Lodges Ltd**. On his part, counsel for the appellant submitted that an award of Kshs.40,000/= would be appropriate. He relied on several authorities as follows:

- **Nicholas Kobia through Agatha Kanampiu vs Overseas Trading Company HCCC No.5832 of 1990.**
- **Margaret Muthoni Mukindi vs Josphat Waithaka Mwangi HCCC No.3784 of 1985**
- **Raphael Mwaniki Kibui vs Joseph Njogu Kinyua HCCC No.3974 of 1988.**

Counsel for the appellant also cited other authorities in respect of which he provided only digest copies.

8. In her judgment the trial magistrate awarded the respondent general damages of 250,000/= subject to contribution.

9. Being aggrieved by that judgment, the appellant has lodged this appeal raising 5 grounds as follows:

- (i) The learned Magistrate erred in awarding general damages of Kshs.250,000/= which are excessive and unjustified in the circumstances;
- (ii) The learned Magistrate erred in not relying on the authorities submitted by the appellant while arriving at her judgment;
- (iii) The learned Magistrate erred in not relying on any authority to arrive at a figure of Kshs.250,000/= awarded in general damages;
- (iv) The learned Magistrate erred in not giving a basis for the award made for general damages;
- (v) The learned Magistrate erred in overstating the extent of the injury sustained by the respondent.

10. Written submissions were duly filed and exchanged between the parties and the court is now being urged to consider this appeal based on those submissions. For the appellant it was submitted that the award of Kshs.250,000/= given by the trial magistrate was too excessive. It was pointed out that Dr. Cyranus Okere examined the respondent one month after the accident but he noted that the injuries were infected by bacteria making them septic.

11. The appellant maintained that the two medical reports produced showed that the respondent's injuries must have been soft tissue injuries, which have healed leaving scars but no permanent incapacity. It was noted that the authority of **Willy Leins vs Leisure Lodges Ltd** (supra) which was relied upon by the respondent involved much more serious injuries where the plaintiff required hospitalization for 3 weeks. He noted that in this case the respondent was admitted for a day.

12. Counsel argued that the trial court did not take into consideration:

- (i) That the injuries suffered were soft tissue injuries;
- (ii) That the injuries healed after 3 – 4 months;
- (iii) That there was no incapacity caused to the respondent.

13. Relying on **Socfinaf Co. Ltd vs Joshua Ngugi Mwaura HCCA.742 of 2003**, and **Butler vs Butler Civil Appeal No.49 of 2003 [1984] KLR 225**, it was submitted that an award of Kshs.50,000/= would have been more than appropriate compensation to the respondent.

14. For the respondent, it was submitted that Dr. Okere's medical report showed that the respondent suffered septic wounds on the right leg caused by a hot piece of metal piercing through his right foot. It was pointed out that Dr. Okere did not make any reference in his report or evidence to infection by bacteria. It was noted that Dr. Modi's medical report also confirmed that the movement of the respondent's big and 2nd toe were restricted due to the piercing by the metal on the right foot. There was also a deep scar with fibrosis.

15. It was noted that the authorities referred to by the appellant's counsel in the lower court, involved injuries which were less serious than the present case. The court was urged to uphold the award of the lower court, noting that the trial magistrate had taken into account all the relevant circumstances and that the award was fair and reasonable for the injuries suffered.

16. I have carefully reconsidered and evaluated all the evidence which was adduced before the trial magistrate as well as submissions and authorities cited. I have also considered the submissions made before me and the authorities referred to. It is evident that the appeal is against the assessment of damages. As was stated in **Butler vs Butler** (supra), the assessment of damages is more like an exercise of discretion by the trial judge and,

“an appellate court should be slow to reverse the trial judge unless he has either acted on wrong principles, or awarded so excessive or so little damages that no reasonable court would; or he has taken into consideration matters he ought not to have considered or not taken into consideration matters he ought to have considered and in the result, arrived at a wrong decision”

17. It was the appellant’s position that in this case the trial magistrate’s award was too excessive as the trial magistrate failed to take into account the nature of the injuries, and also did not consider comparable authorities. The two medical reports which were produced by consent confirmed that the respondent was injured on his right foot as a result of being pierced by a hot metal. Dr. Cyprianus Okoth Okere who examined the respondent just about a month after the accident noted that the respondent had wounds on the right upper and lower leg which were septic.
18. Dr. Modi a consultant orthopedic surgeon who examined the respondent more than 10 years after the accident, noted that although the respondent’s injuries had healed completely, he had two permanent irregular scars one of which was deep with fibrosis over the dorsum of the big and second toe and adjacent foot. Dr. Modi further noted that the movement of the big and second toe was restricted. Although the respondent was able to walk without any support, slight swelling over the right foot was expected after a long distance walk.
19. Both the two medical reports also made reference to the fact that the respondent was admitted and treated at Kenyatta National Hospital. Although the discharge summary from Kenyatta National Hospital was only marked for identification and not produced in evidence, the respondent’s evidence that he was admitted at Kenyatta National Hospital for one month was not controverted.
20. From the above, it is apparent that the respondent’s injuries were not just minor soft tissue injuries as the appellant would have us believe. The case of *Socfinaf Co. Ltd vs Joshua Ngugi Mwaura* (supra), which was cited by the appellant’s counsel involved blunt injury to the right forearm in respect of which there was no hospitalization or no permanent disability. Those injuries were certainly not comparable with the injuries suffered by the respondent herein which resulted in hospitalization for one month and has not only resulted in permanent scarring but also restriction of the movement of the big and second toe. The cases of *Margaret Muthoni Mukindi vs Josphat Waithaka Mwangi* (supra) and the case of *Raphael Mwaniki Kibui vs Joseph Njogu Kinyua* (supra), which were also cited by the appellant’s counsel also involved minor soft tissue injuries in respect of which hospitalization was not necessary.
21. I find that the appellant has grossly understated the injuries which were suffered by the respondent. Nonetheless, although the injuries suffered by the respondent had some residual effect, the respondent did not suffer any fractures and the element of permanent incapacity was minimal. The respondent only produced a digest copy of the case of *Willy Leins vs Leisure Lodges Limited* (supra), which he relied upon. It was not therefore possible to appreciate the usefulness of that authority for comparison purposes. In awarding the sum of Kshs.250,000/=, the trial magistrate did not refer to any comparable authorities. I find that given the circumstances of this case, the sum of Kshs.250,000/= awarded by the trial magistrate was excessive. Such an award would have been appropriate where the injuries included a fracture which was not the case. I find that this is an appropriate case calling for interference with the exercise of the trial magistrate’s discretion. Accordingly, I set aside the award of Kshs.250,000/= made by the trial magistrate. I substitute thereof an award of Kshs.150,000/= subject to contribution. To that extent only does the appeal succeed. Those shall be the orders of this court.

Dated and delivered this 10th day of February, 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Mrs. Otieno for the appellant

Advocate for the respondent absent