REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 610 of 2004

DEVKI STEEL MILLS LTD. ………..……….. APPELLANT

VERSUS

ZABLON MUSWAHILI….…………………..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. This appeal arises from a suit which was filed in the Magistrate's Court at Nairobi by Zablon Muswahili, hereinafter referred to as the respondent. He had sued his former employer, Devki Steel Mills Ltd., hereinafter referred to as the appellant. The respondent sought to recover general and special damages, as well as loss of future earnings, arising from injuries suffered by him, during the course of his employment. The respondent contended that the accident was caused by the negligence, and/or breach of statutory duty, and/or breach of contractual duty on the part of the appellant.

2. In its further amended defence filed in Court, the appellant admitted that the respondent was at the material time its employee. The appellant however, denied knowledge of the occurrence of the accident, or that the alleged accident was caused by the appellant's negligence, and/or breach of statutory or contractual duty. The appellant denied all the particulars of negligence attributed to it, and maintained that the respondent was entitled to any damages, or damages for lost or future loss of earnings or diminished earning capacity.

3. Hearing of the suit proceeded before a Senior Principal Magistrate. Three witnesses testified for the respondent. These were Dr. Washington Wokabi a consultant surgeon, Denis Ogot Kebwaro (Denis), and the respondent. Briefly the evidence adduced in support of the respondent's case was as follows:

4. The respondent was employed by the appellant in September 2003 as a general worker. On 2nd February, 2004 the respondent was on duty. The work done by the company included melting scrap metals to make iron bars. The respondent was assigned to work as a furnace charger, his work being to feed metal bars into the furnace. During the course of his work, the respondent was injured by a piece of metal which went through his shoes and pricked him at the middle of his right foot (referred to as leg by some witnesses). The respondent was not supplied with any boots and was therefore wearing his personal shoes which were a pair of leather shoes.

5. Denis, who was also a furnace charger at the same place with the respondent, pulled out the piece of metal which was about 3 inches long. The respondent was referred to the company nurse, but the nurse had already reported off duty. The respondent therefore went home until the next day when he went to Kitengela Health Centre where he was attended. However, the respondent's leg became very swollen. The

respondent was unable to go to the hospital as he did not have any transport to take him to hospital. Although a supervisor of the appellant visited the appellant at his house, the appellant did not offer the respondent any transport. About a week later, the respondent got assistance from his church Pastor who took him to Kenyatta National Hospital. The respondent was admitted at the Kenyatta National Hospital from 12th February, 2004 to 22nd April, 2004. The respondent's right leg had to be amputated as the metal which had pierced him was poisonous and the leg had become infected.

6. The respondent was later examined by Dr. Wokabi, who found that the metal which pricked the respondent, introduced infection which involved the muscles and other soft tissues of the leg, necessitating the amputation of the right leg in order to avoid risk of death through the spreading of infection. Dr. Wokabi assessed the respondent's disability at 50%. He recommended that the respondent use an artificial limb at an estimated cost of Kshs.30,000/=.

7. The appellant called four witnesses in support of its defence. These were: Sylvester Mutiso John (Sylvester), who is a supervisor in the appellant's firm; Steven Mutuku (Mutuku) an assistant personnel manager of the appellant; Steven Kisau (Kisau) a furnace charger in the appellant's firm; and Eunice Maeli, (Eunice) a nurse working with the appellant.

8. Their evidence was briefly that on the material day, the respondent was working in the furnace section together with Kisau and Denis. The respondent was provided with protective clothing which included overalls, safety boots and hand gloves. The respondent worked for the full shift and did not complain of any injury to his supervisor or his colleagues. On the 3rd February, 2004, the respondent did not go to work, but sent Denis to collect his salary. Mutuku accompanied Denis to the respondent's house, where he paid the respondent his dues. The respondent complained to Mutuku that he had a strange disease, and Mutuku advised him to go to any government hospital.

9. Eunice produced the medical ledger for the company clinic, showing that there was no record of the respondent having gone to the clinic for treatment. Eunice stated that if the respondent was pricked by a piece of metal, it would have been necessary for him to be given anti-tetanus injection and treatment on the same day. She maintained that if the respondent was given the anti- tetanus injection the same day he was pricked, his injury would not have worsened.

10. Counsel for each party filed written submissions each urging the Court to find in favour of his client. For the respondent it was submitted that the appellant failed to take precautions for the safety of its employees as required by law and that the appellant failed to provide the respondent with protective clothing. It was submitted that the respondent had provided clear evidence that he was injured at the appellant's premises. The Court was urged to reject the evidence of the appellant's witnesses and find the appellant liable. It was submitted that the injury of the respondent was initially minor in nature and that is why it was ignored by the appellant's officers, but the injury became serious as a result of infection by bacteria.

11. The Court was urged to adopt the report of Dr. Wokabi, and award the respondent general damages of Kshs.1,300,000 million. It was submitted that the respondent had suffered loss of employment or diminished earning capacity because his chances of getting employed in the labour market were reduced. The Court was urged to adopt a multiplier of 20 years as the respondent was only 38 years. Using the respondent's earning of Kshs.290/= per day, a sum of Kshs.1,958,800/= was proposed as the respondent's loss of earning. The Court was urged to award a further sum of Kshs.180,000/= in respect of cost of artificial limb and replacement after every 5 years. In the light of the Court's pecuniary jurisdiction, the Court was urged to award a global award of Kshs.2 million to cover all the heads of damages.

12. For the appellant it was submitted that the company followed all safety requirements and provided the respondent with safety boots and other safety gear, as it did to other workers. It was submitted that the respondent had a duty and a responsibility to himself and to his employer to wear the safety gear. It was maintained that there was no injury suffered by the respondent at the appellant's premises, as the respondent did not report any such injury to the supervisor, nor was such a report

recorded. It was submitted that the injury must have been suffered outside the appellant's factory. It was further observed that none of the doctors who initially treated the respondent were in the Court to testify to the kind of injury they treated. The Court was urged to find that Denis did not speak the truth and was therefore an unreliable witness. The Court was further urged to find that the respondent did not prove that he was injured in the appellant's premises and therefore his claim should fail.

13. The Court was referred to Winfield and Jolowicz on Tort, wherein it is stated that the employers' duty of care is not an absolute duty, and that it is for the employee to prove its breach. Relying on *Kiema Muthuku vs. Kenya Cargo Handling Services Limited [1991] 2 KAR 258,* it was submitted that the fact that the respondent was injured at his place of work alone, with no proof of the appellant's negligence, was not enough to render the appellant liable. In this case, it was argued, that the respondent was unable to establish not only that he was injured at the appellant's premises, but also that the appellant was negligent. The Court was therefore urged to find the appellant not liable.

14. With regard to quantum of damages, it was proposed that the following would be adequate.

General damages Kshs.400,000/=

Cost of prosthesis Kshs.120,000/=

Loss of earnings Kshs.226,200/=

15. In her judgment the trial Magistrate found Denis to be a reliable witness, whose evidence corroborated the evidence of the respondent. The trial Magistrate further found that the respondent was injured by a scrap metal during the course of his work, and that he reported the injury to the melter who was in charge. The melter did not consider the injury sustained to be of such seriousness as to require immediate medical attention. The trial Magistrate was satisfied that the amputation of the respondent's leg resulted from the infection caused by the injury occasioned by the scrap metal and that amputation was necessary to save the life of the respondent. Further, the trial Magistrate found that the respondent was not issued with any safety boots by the appellant. The trial Magistrate ruled that the appellant was negligent in not providing the respondent with safety boots, having regard to the fact that the place where the respondent was working was littered with pieces of scrap metals. The trial Magistrate therefore concluded that the appellant was wholly liable to the respondent. The trial Magistrate awarded a sum of Kshs.1,000,000/= as general damages for pain, suffering and loss of amenities , Kshs.814,320/= for loss of earning capacity, Kshs.150,000/- for cost of artificial limb and Kshs.2000/= for special damages.

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

(i) The learned Magistrate erred in holding the appellant liable.

(ii) The learned Magistrate erred in holding that the respondent had proved his case on a balance of probability.

(iii) The learned Magistrate erred in holding the appellant liable, when the respondent and/or the evidence on record clearly stated/showed otherwise.

(iv) The learned Magistrate erred in holding the appellant liable without any negligence having been proved on the part of the appellant.

(v) The learned Magistrate erred in finding the appellant in breach of its duty of care towards the respondent.

(vi) The learned Magistrate erred in holding the appellant wholly liable or liable at all for the respondent's injuries.

(vii) The learned Magistrate erred in not dismissing the respondent's claim on grounds of his failure to prove negligence on the part of the appellant.

(viii) The learned Magistrate erred in awarding general damages of Kshs.1,000,000/= which are excessive and unjustified.

(ix) In the circumstances the learned Magistrate erred in awarding loss of earnings at Kshs.814,320/= and/or any other relief namely artificial limb at Kshs.150,000/= as liability was not proved and the same are excessive and unjustified.

17. Following a consent agreed to by the parties, written submissions have been duly exchanged and filed, and the Court invited to determine this appeal based on those submissions. For the appellant it was submitted that the trial Magistrate failed to consider the injury ledger produced by the defence witness, which showed that no injury occurred on the 22nd February, 2004. It was submitted that the attendance register also did not reflect any injuries. The defence counsel maintained that the respondent concealed the truth, as there was sufficient evidence that all employees working in the furnace section were given safety gear.

18. It was contended that there was evidence that no employee could be allowed to work without safety boots, and that Sylvester the defence witness, confirmed that he personally gave the respondent safety boots. This was confirmed by defence Exh.2 which was signed by the respondent. It was further submitted that if the respondent who admitted knowing that it was dangerous to work in the premises without safety boots, went ahead to work without safety boots, then he chose to place himself in danger and had only himself to blame. It was maintained that the appellant provided a safe system of work and issued the respondent protective gear, and therefore there was no evidence upon which the appellant could be held liable.

19. With regard to damages, it was submitted that the award of Kshs.1 million for pain, suffering and loss of amenities was excessive and unjustified. It was contended that the trial Magistrate followed authorities where the degree of permanent disability was assessed at much higher than the respondent's 50%. It was argued that the Court did not take into account that the degree of the respondent's disability would be greatly reduced if the respondent uses a prosthesis leg. It was submitted that in that case, the degree of permanent disability would be reduced to 10%, and the respondent should therefore not have been awarded more than Kshs.300,000/=.

20. With regard to loss of earning capacity, it was submitted that the award of Kshs.814,320/= was excessive and unjustified. It was contended that the multiplier of 12 adopted by the trial Magistrate did not take into account the uncertainty factors such as death or loss of employment. It was argued that a multiplier of 8 would have been reasonable, and therefore the award in respect of loss of earning should have been Kshs.542,880/=.

21. Relying on *Butler vs. Butler* [1984] KLR 225 the Court was urged to reverse the award made by the trial Magistrate as the lower Court:

(a) acted on wrong principles of law;

(b) awarded so excessive, or little damages that no reasonable Court would;

(c) considered matters he ought not to have considered or did not take into account matters which ought to have been considered.

22. For the respondent, the Court was urged to uphold the judgment of the lower Court. It was submitted that the trial Magistrate properly considered the evidence and came to the conclusion that the respondent was not provided with safety boots. It was pointed out that the appellant's own witness testified that the pieces of metal lying around were poisonous. The appellant was therefore aware of the apparent danger in failing to issue the respondent with safety boots, and must be held liable.

23. It was submitted that the respondent's witness Denis, testified that the respondent was indeed injured at the work place. The trial Court which had the opportunity to see, hear and observe the demeanor of the witnesses, considered that evidence together with that of the appellant's witnesses who denied that the respondent was injured at work, and rightly came to the conclusion that the appellant's witness was unreliable.

24. It was observed that the fact that the respondent was injured was further confirmed by Dr. Wokabi, as well as the case summary from Kenyatta National Hospital. It was further noted that the respondent reported his injuries to the immediate person in charge, who was the melter working for the appellant and whom the appellant did not call to testify. It was therefore maintained that the trial Magistrate's findings were all based on evidence and that the appellant did not demonstrate that the trial Magistrate misunderstood the evidence, or failed to take into account relevant factors.

25. As regards the award of damages, it was submitted that the award of Kshs.1 million was proper, and comparable with the awards in the cases which were cited to the trial Magistrate. Regarding the damages for loss of earnings, the Court was referred to *HCCC No. 349 of 1996, Isabel Nyambura vs. Sanric Suppliers Limited,* where a sum of Kshs.1,500,000/= was awarded to a minor, who had her left lower limb amputated. The Court was also referred to *Civil Appeal No.6 of 2003 Jackson Mutuku Ndetei vs. A.O Bayusuf & Sons Ltd. [2007] eKLR,* in which the Court of Appeal awarded a sum of Kshs.1,350,000/= as loss of future earnings, to a 27 year old engineering student, who suffered amputation of the leg, above the left knee, and disfunction of the right lower limb leading to total permanent incapacity of 85%. It was submitted that the trial Magistrate carefully considered the case of the respondent in making the award for the cost of artificial limb. The Court was therefore urged not to disturb the award of general damages.

26. I have carefully reconsidered and evaluated all the evidence which was adduced in the lower Court. I have also given due consideration to the judgment of the lower Court, the memorandum of appeal, and the submissions which were made before the lower Court and before this Court. From the pleadings it was not disputed that the respondent was at the material time employed by the appellant. The matter in issue was whether the appellant was under any duty to the respondent, whether the respondent was injured during the course of his employment, and if so, whether the injury was caused by the negligence of the appellant or breach of the appellant's statutory duty or breach of contract.

27. The respondent and his witness testified that the respondent was injured at his place of work. This was denied by the appellant's witnesses who claimed that the respondent did not report or complain of any injury. Denis who was working with the respondent in the furnace section explained how the respondent's foot was pierced by a piece of metal which went through the respondent's shoe. Denis explained how he assisted the respondent by pulling out the piece of metal.

28. Denis and the respondent both maintained that the respondent reported his injury to the "melter" who was on duty, and that the melter referred the respondent to the company doctor/nurse, but there was none on duty as at that time. It is apparent from the evidence of the appellant's witness Sylvester, that he was not in the furnace section, and would ordinarily rely on the melter for any information regarding injury in that section. The evidence of the melter was therefore crucial. The appellant did not however, call the melter to testify, and the respondent's evidence that he reported to the melter therefore remained unchallenged.

29. Mutuku who also claimed to be unaware of the respondent's injury also admitted that he merely relied on the registers. The evidence of Mutuku however, confirmed the respondent's evidence that the respondent was unable to report to work. The respondent explained that when he went to the nurse the nurse had already left. That explains why the respondent's injury was not recorded by the nurse. Again the nurse who was on duty on the material day was not called to testify. Kisau who was working at the same place with the respondent also conceded that he did not know about the respondent's injury as he was not where the respondent was injured. It would appear that the appellant's witnesses were not independent as they were apparently trying to protect the interests of their employer.

30. The trial Magistrate having assessed the evidence, the demeanor and the credibility of the witnesses, believed the evidence of the respondent, and found that he was injured at his place of work. In the case of *Tayab vs. Kinanu [1983] KLR 114,* it was held:

"*the appellate court will not interfere with a judge's findings of fact based on his assessment of the credibility and demeanor of witnesses who gave evidence before him unless it was wrong in principle."*

Thus, it was for the appellant to convince this Court that the trial Magistrate's finding was wrong in principle. The appellant has not succeeded in that regard. I therefore find no basis to depart from the trial Magistrate's finding that the respondent was injured at his place of work.

31. The duty of an employer to an employee is described in *Halsbury's Laws of England 4th Edition, Vol.16 par.562*, as follows:

"*It is an implied term of the contract of employment at common law, that an employee takes upon himself risks necessarily incidental to his employment. Apart from the employer's duty to take reasonable care; an employee cannot call upon his employer, merely upon the ground of their relation of employer and employee, to compensate him for any injury which he may sustain in the course of his employment in consequences of the dangerous character of the work upon which he is engaged. The employer is not liable to the employee for damage suffered outside the course of his employment. The employer does not warrant the safety of the employee's working condition nor is he an insurer of his employee's safety; the exercise of due care and skill suffices."*

32. The above passage was adopted by the Court of Appeal in the case of *Mwanyule vs. Said t/a Jomvu Total Service Station [2004] 1 KLR 47*, as the Law applicable in Kenya. In that case the Court of Appeal concluded that the employer owes no absolute duty to the employee, and the only duty owed is that of reasonable care against risk of injury caused by events reasonably foreseeable, or which would be prevented by taking reasonable precaution. That is the law that I am obliged to apply. Thus, in order for the respondent in this case to succeed in his claim, he had to establish that the appellant failed to exercise reasonable care for his safety against risks which were reasonably foreseeable.

33. In the present case, it was not disputed that the respondent was working in the furnace section of the appellant's company, and that his work included feeding metal bars into the furnace. It was also conceded by the appellant's witnesses that there were a good amount of pieces of metal which were lying around and therefore it was necessary for the workers to use safety boots. The question is whether the respondent was supplied with safety boots by the appellant.

34. While the respondent maintained that he was not issued with any safety boots, the appellant's witnesses contended that the safety boots were issued. The appellant relied on records signed by employees which were produced as defence Exhibits 1, 2 & 3. Defence Exh.1 did not make any reference to any protective clothing which were issued to staff. Defence Exh.2 was a list showing staff supplied with safety boots, new special overalls, special masks and what is indicated as "normal".

35. Against the respondent's name, it is indicated that he was from the furnace section. The safety items issued to him is indicated as "normal". This was not explained by the appellant's witnesses. Given that there are other entries referring to "new special overalls" issued to other staff, the trial Magistrate's finding that "normal" referred to "normal overalls" and not safety boots is reasonable. Defence Exh. 3 only refer to the issuance of hand gloves. The three documents therefore do not support the appellant's position that the respondent was issued with safety boots. Indeed the respondent's contention that not all staff were issued with safety boots is supported by Defence Exh.2 which shows no entries for supply of safety boots for several staff.

36. The appellant was under a duty to exercise reasonable care against risk of injury which could be prevented by taking reasonable precaution. Secondly, under section 53 of the Factories Act Cap. 514, the appellant was under a statutory duty to provide the respondent with protective clothing. It being apparent that the work done in the furnace section of feeding pieces of metal into the furnace, resulted in

many pieces of metal being left lying around, and that the pieces of metal were poisonous, the possibility of the employees being injured by the pieces of metal was not unforeseeable. The appellant was therefore under a responsibility to take reasonable precaution to minimize the risk of injury to the respondent and other workers, by ensuring that there were no pieces of metal left lying around, and providing the respondent and other workers with safety boots.

37. By failing to provide the respondent with safety boots, the appellant was in breach of both its common law duty of care to the respondent, and breach of its statutory obligation. It is clear to me that the respondent's would not have suffered the injury if he was provided with safety boots or if the pieces of metal were not left lying around. Therefore the respondent's injuries were directly caused by the negligence of the appellant. An attempt was made to lay blame on the respondent for working without safety boots whilst being aware of the danger he was exposed to. Nevertheless the appellant did not plead any contributory negligence on the part of the respondent. He cannot raise such an issue at this stage. The upshot of the above is that the appellant was liable for the respondent's injury.

38. As regards the issue of quantum, the report of Dr. Washington Wokabi, and the case summary from Kenyatta National Hospital both showed that the respondent was admitted in hospital after his leg became infected as a result of being pricked by a rusty piece of metal. The infection resulted in the leg being amputated. The respondent has therefore suffered a disability which Dr. Wokabi assessed at 50%. In assessing the quantum of damages, the trial Magistrate took into account the authorities which were cited to her. The trial Magistrate properly directed herself noting that the respondent did not suffer total loss of earning capacity as he could still do work which did not require him to work standing.

39. The respondent was aged 35 years at the time of the accident. The multiplier of 12 adopted by the trial Magistrate was therefore reasonable. It was argued that the respondent's disability would reduce considerably with a prosthesis leg. I concur that the prosthesis leg would enable the respondent to walk with minimal support. However, it would not result in the respondent being fully functional as to justify reducing the permanent incapacity to 10%. The disability assessment at 50% would therefore remain. I find that the appellant has failed to demonstrate that the award made by the trial Magistrate was based on wrong principles or that it was so low or high as to justify the intervention of this Court.

40. I therefore find no merit in this appeal and do dismiss it with costs. Orders accordingly.

Dated and delivered this 17th day of September, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Ms. Mwangi for the appellant

Mr. Kaburu for the respondent