



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

**CIVIL APPEAL 75 OF 2002**

**SOKORO SAW MILLS LTD.....APPELLANT**

**VERSUS**

**BERNARD WAINAINA GACHANJA.....RESPONDENT**

**JUDGMENT**

The respondent, Bernard Wainaina Gachanja filed suit against the appellant seeking to be paid damages on account of injuries he alleged to have sustained at his place of work. He averred that on the 10<sup>th</sup> February 1998, while he was on duty at the appellant's premises, he fell down on a stair case and as a result of which he was seriously injured. The respondent blamed the said fall on the negligence of the appellant, who, according to him had, *inter-alia*, failed to provide the respondent with a safe working environment by exposing him to risk of damage or injury. The respondent set out the particulars of negligence on the part of the appellant. He also set out the particulars of his injuries and the special damages he alleged to have incurred.

The appellant filed a defence and denied that it was responsible for the injuries that the plaintiff had sustained. The appellant averred that if the respondent was injured while on duty, then it was due to his own negligence because he had, *inter-alia*, failed to take necessary precaution for his own safety so as to prevent the said industrial accident from occurring. The appellant put the respondent to strict proof thereof on the injuries that he alleged to have sustained. After hearing the respondent and the appellant, the trial magistrate entered judgment on liability in favour of the respondent. He ruled that the respondent was to bear 10% contributory negligence. He assessed the damages payable to the respondent at Ksh.977,000/= less 10% contribution. The final amount awarded was Ksh.879,300/=. The respondent was awarded costs and interest.

The appellant was aggrieved by the said decision of the trial magistrate and filed an appeal to this court. The appellant raised four grounds of appeal challenging the decision of the trial magistrate. It stated that the trial magistrate erred in finding in favour of the respondent on liability yet evidence had been adduced which had established that the respondent was not injured while on duty. The appellant was aggrieved that the trial magistrate had disregarded the evidence adduced by the appellant before he arrived at the said decision in favour of the respondent. The appellant faulted the trial magistrate for awarding general damages to the respondent that was excessive in the circumstances. The appellant was finally aggrieved that the trial magistrate had failed to consider its submissions before he arrived at the said decision in favour of the respondent.

At the hearing of the appeal Mrs. Muthiga, counsel for the appellant submitted that the appellant was appealing both on liability and quantum. She argued that the trial magistrate had used the evidence adduced by the appellant to make findings in favour of the respondent. She submitted that the appellant had established that the respondent was not at work when he claimed that he was injured. She questioned

the outpatient records which were relied on by the respondent in support of his case that he was admitted at Elburgon Hospital after he had allegedly sustained the said injuries. She took issue with the fact that the trial magistrate had ignored the evidence of the muster roll which had been produced by the appellant and which had confirmed that the appellant was not on duty on the material day that he claimed to have been injured as he was on sick off.

Mrs. Muthiga maintained that the respondent did not adduce any evidence to corroborate the evidence that he was injured while he was on duty. She submitted that there was contradiction in the testimony of the respondent as to the circumstances of the accident which contradiction ought to have been resolved in favour of the appellant by finding that the respondent had substantially contributed in negligence to the injuries that he sustained. She submitted that the medical reports which were produced in court clearly established that the respondent did not suffer the serious injuries as he alleged. She submitted that the general damages awarded to the respondent were not consonant with the injuries that the respondent had sustained. She urged the court to review the said damages awarded and make an appropriate award.

Mr. Kisila for the respondent opposed the appeal. He submitted that the trial magistrate had properly evaluated the evidence adduced before him and had arrived at the correct decision finding in favour of the respondent. He urged this court to re-evaluate the evidence, taking into consideration that the trial magistrate had the advantage of assessing the demeanour of the witnesses as they testified. He submitted that the respondent had established in his evidence that he was injured while he was on duty at the appellant's premises due to the appellant's negligence. He maintained that no evidence was adduced by the appellant which established that the respondent was guilty of contributory negligence.

Mr. Kisila submitted that the respondent had established that he had sustained serious injuries which injuries were confirmed by the testimonies of Dr. Kiamba and Dr. D'Cunha. He maintained that the injuries sustained by the respondent were consistent with his evidence on the circumstances of the accident. He submitted that the trial magistrate properly rejected the evidence by the appellant that the respondent was not on duty when he was injured. He argued that the documents that the appellant sought to rely on in its bid to establish that the respondent was not on duty were documents which were generated by the appellant itself. He submitted that the respondent had established that he was injured while he was on duty due to the negligence of the appellant who had failed to provide a safe working environment for the respondent. Mr. Kisila urged this court not to interfere with the trial magistrate's assessment of general damages. In his view, the said general damages awarded were reasonable in the circumstances, taking into consideration the nature of the injuries that the respondent sustained. He urged this court to dismiss the appeal with costs.

As the first appellate court, this court is required to reconsider the evidence adduced before the trial magistrate's court, evaluate it itself and draw its own conclusion. This court is however required to always put in mind the fact that it neither saw nor heard the witnesses and therefore cannot be expected to make any finding as to the demeanour of witnesses. As was stated by the Court of Appeal in Selle vs Associated Motor Boat Co. Ltd [1968] E.A 123 at page 126;

***“In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”***

In the present appeal, the appellant launched a two prong attack on the judgment of the subordinate court. The first line of assault related to the trial magistrate's finding on liability. The appellant complained that the trial magistrate had failed to consider the evidence of the appellant to the effect that the respondent was not on duty when he alleged that he sustained injuries. The appellant relied on the testimony of DWI Samuel Kiambuthi who produced a muster roll which indicated that the respondent was on sick off when he alleged that he was on duty. The muster roll was produced as *defence's exhibit No.1*. In the same muster roll, it was noted that the respondent was on sick off on several days between the 4<sup>th</sup> and the 28<sup>th</sup> February 1998.

DW1 testified that the respondent had told him that he had sustained his injuries when he was attacked by thugs. The appellant further relied on the evidence of DW3 John Njoroge, the Health Records & Information officer at Elburgon Nyayo Hospital who testified that the out-patient No.686/98 in their records appeared in the name of one Isaac Kariuki and not the respondent. DW3 had testified that, at the time, male patients were not admitted at the hospital. The appellant submitted that the discrepancy in the medical documents of the respondent clearly indicated that the respondent was injured elsewhere and not at the appellant's premises.

On his part, the respondent submitted that the evidence that he had adduced before the trial magistrate's court had established that he was injured at the appellant's premises and further that he was treated at Elburgon Nyayo Hospital. The respondent submitted that PW3 Yuniah Moraa, a Medical Records Technician had confirmed that the medical treatment chit produced by the respondent was genuine and was issued by the Elburgon Hospital. She however testified that she could not produce the out-patient record because the same was in the safe custody of the hospital.

On re-evaluation of the evidence adduced by the respondent and the appellant in respect of the circumstances in which the respondent was admitted at the Elburgon Nyayo Hospital, it is clear that the medical record which the respondent relied on in his case was suspect. DW3 produced the out-patient register which established that the out-patient No.686/98 was one Isaac Kariuki and not the respondent. Further, there was contradiction in the evidence adduced by the respondent and his witnesses on this point. He testified that after he had sustained the said injury, he was admitted at the Elburgon Nyayo Hospital as an in-patient for four days. The respondent should have produced medical documents that indicated that he was so admitted. Instead he produced a card which indicates that he was treated as an out-patient.

Further, DW3 testified that the Elburgon Nyayo Hospital did not at the time have in-patient facilities for male patients. He testified that in the event of emergency, male patients would be admitted for a day and then transferred to other hospitals for further treatment. It is evident from the foregoing, that, on a balance of probabilities, the appellant established that the said medical document relied on by the respondent was a forgery.

A second aspect of the appellant's case that raises doubt on his testimony that he was injured while he was at his place of work was the testimony of DW1 Samuel Kiambuthi, a supervisor at the saw mill. He produced a muster roll which indicated that the respondent was on sick leave on the day that he claimed that he was on duty. While it is conceded that the said muster roll being a document prepared by the appellant could be tampered with, having carefully perused the said document, it is evident that the said muster roll is a genuine document which the trial magistrate erroneously failed to consider. It contains names of other employees other than that of the respondent. It is not disputed that the respondent was injured. The appellant has however raised doubt to the respondent's allegation that he was injured while he was on duty at the appellant's premises. It could well be that the respondent was injured when he was attacked by thugs according to the testimony of DW1.

Another aspect of the respondent's testimony that was contradictory was his evidence on the circumstances that he claimed he was injured. He told the trial court that he was injured when he slipped as he was walking down the concrete stairs. He testified that the said stairs had six steps. He further testified that there were no guard rails on the said stairs. He testified that he was injured because it had rained on the particular night resulting in the said stairs becoming wet and slippery. He attributed his fall to the failure by the appellant to construct a canopy over the said stairs so that it would not become wet when it rained. This was a very important aspect of the respondent's case. He however did not plead it in his plaint. Apart from generally setting out the particulars of negligence, the respondent failed specifically to plead this aspect of his case. The evidence that he adduced in support of his claim on this aspect of his case was not supported by his pleadings.

The trial magistrate therefore erred when he evaluated the respondent's evidence without first determining whether or not that aspect of the evidence had been pleaded. On re-evaluation of the evidence adduced, this court formed the opinion that it was highly unlikely that the respondent sustained

the serious injuries that he did if he fell down, as he claimed, on a flight of six stairs. It was most probable that the respondent was injured elsewhere or in other different circumstances. Taking into totality the entire evidence adduced by the respondent and the appellant, including the material contradictions pointed out in this appeal, I do hold that the respondent failed to prove on a balance of probabilities that he was injured while he was at his place of work.

The upshot of the above reasons is that the appeal by the appellant on liability succeeds. The respondent failed to establish to the required standard of proof on a balance of probabilities, that he was injured while he was at his place of work. He further failed to plead material aspects of the circumstances of how he alleged he was injured while he was at his place of work. The trial magistrate therefore erred when he allowed the respondent to adduce evidence which was not supported by the duly filed pleadings. It would be unnecessary for this court to consider whether or not the quantum of damages was properly assessed in view of the finding by this court that the respondent failed to prove his case on liability to the required standard of proof on a balance of probabilities.

The appeal is allowed with costs. The judgment and decree by the trial magistrate is hereby set aside and substituted by this court's judgment dismissing the respondent's suit with costs.

It is so ordered.

**DATED at NAKURU this 26<sup>th</sup> day of OCTOBER, 2007**

**L. KIMARU**

**JUDGE**