



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

**Civil Appeal 22 of 2006**

**HEMGROWN (K) LTD.....APPELLANT**

**VERSUS**

**JOSEPH OTIENO MUWONGO.....RESPONDENT**

**JUDGMENT**

The Respondent, Joseph Otieno Muwongo sued the appellant, Homegrown (K) Ltd seeking to be paid damages on account of injuries he alleged to have sustained on the 29<sup>th</sup> November 2003 while he was on duty as an employee of the appellant. The respondent claimed that he fell down from a height and sustained serious injuries. He attributed this fall to the negligence of the appellant whom he claimed, *inter alia*, had failed to provide him with a proper and safe system of work and had thus exposed him to risk of injury, which it knew or ought to have known in the circumstance. The respondent particularized the particulars of breach of contract and the injuries that he alleged he sustained. The appellant filed a defence. It denied that it was a negligent or that it had failed to provide the respondent with a safe environment in which to work. The appellant averred that if the respondent was injured, then it was due to his own negligence. The appellant stated that the respondent had contributed to the said accident in that he had, *inter alia*, failed to take any or any precaution for his own safety so as to avoid the said industrial accident.

At the hearing of the case, the parties herein agreed by consent to compromise liability by consent. Liability was apportioned as between the appellant and the respondent at the ratio 75:25 in favour of the respondent. The appellant was to shoulder 75% liability whilst the respondent was to bear 25% contributory negligence. The parties to the suit then presented the medical report prepared by Dr. Otara and by Dr. Kiamba to the court for the purposes of assessment of damages. Neither the appellant nor the respondent offered any oral evidence in court.

As will be evident later in this judgment, the procedure adopted by the appellant and the respondent put the trial court in a difficulty because it was unable to reconcile the different opinion of the two doctors. In any event, once the issue of liability was settled, it was a legal requirement that the respondent testifies to establish the injuries that he had sustained so that the trial court could properly assess the damages that was to be paid to the respondent on account of the injuries that he alleged to have sustained. The trial magistrate proceeded and assessed the damages on the basis of the two medical reports submitted to her by the appellant and the respondent. She assessed the general damages payable to the respondent at Ksh.160,000/= less 25% contribution. The respondent was thus awarded Ksh.120,000/= general damages with special damages of Ksh.1,500/=. The respondent was further awarded costs of the suit. The appellant was aggrieved by the judgment of the trial magistrate and appealed to this court.

In its memorandum of appeal, the appellant raised five grounds of appeal. The said grounds of appeal may be summarized as hereunder; the appellant was aggrieved that the trial magistrate had exaggerated and inflated the award of general damages to be paid to the respondent. In the opinion of the appellant, the said award was manifestly excessive taking into account the nature of the injuries that the respondent had sustained. The appellant was aggrieved that the trial magistrate failed to consider the authorities supplied by the appellant and thus arrived at a decision contrary to the said decided cases. The appellant urged the court to allow the appeal, set aside the award of the trial magistrate and substitute it with an appropriate award of this court.

At the hearing of the appeal, Mr. Simiyu for the appellant submitted that the trial magistrate had erred

when she only considered the medical report prepared by Dr. Kiamba and thereby ignored the medical report prepared by Dr. Otara. He submitted that although Dr. Kiamba had stated that the respondent had sustained a fracture of his right clavicle, Dr. Otara had examined the respondent and found no such fracture. He maintained that the only injuries that the respondent sustained were soft tissue injuries. He submitted there was no basis upon which Dr. Kiamba could have established that the respondent had sustained the fracture of the right clavicle. He urged the court to consider the medical report by Dr. Otara and find that the respondent only sustained soft tissue injuries. He submitted that the trial magistrate clearly erred when she failed to properly consider the injuries that the respondent had sustained before she arrived at the decision to assess the general damages payable to the respondent for pain, suffering and loss of amenities. Mr. Simiyu urged the court to consider the decisions of comparable awards and give an appropriate finding on the correct quantum of damages to be paid to the respondent. He urged the court to allow the appeal.

Mr. Gekong'a for the respondent opposed the appeal. He submitted that Dr. Kiamba had relied on the initial medical treatment documents including X-rays to determine the respondent had sustained a fracture of the right clavicle in the accident. Mr. Gekong'a submitted that the trial magistrate had rightly ignored the medical report of Dr. Otara because the said doctor wrote a medical report without placing any reliance on the initial medical treatment documents. He maintained that the fact that the respondent was given two months sick off was consistent with the injuries of a fracture that he had sustained. Mr. Gekong'a urged the court not to disturb the finding of the trial magistrate who had properly assessed the damages to be paid to the respondent. He urged the court to dismiss the appeal with costs.

This being a first appeal, this court has the duty to re-evaluate the evidence, assess it and reach its own conclusion, always putting in mind the fact that it neither saw nor heard the witnesses as they testified (See Maore vs Mwenda [2004] eKLR at page 3). In the present appeal, the appellant challenged the decision of the trial magistrate in her assessment of general damages payable to the respondent. The principles to be considered by this court in determining whether or not to interfere with an assessment of general damages by a trial court are well settled. In Kemfro Africa Ltd t/a Meru Express Services & Anor. vs A. M Lubia & Anor [1987] KLR 30 at page 35, Kneller JA, held that;

***“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of East Africa to be that it must be satisfied that either the judge, in assessing the damages took into account an irrelevant fact, or left out of account a relevant one, or that, short of this, the amount is so inordinately lower so inordinately high that it must be a wholly erroneous estimate of the damage...”***

As stated earlier in this judgment, no oral evidence was offered by the parties to this suit other than the two medical reports that were submitted to the trial court by consent of the parties. The trial magistrate was thus denied an opportunity of seeing and hearing the witnesses as they testified so that she could form an opinion who to believe between the said two doctors. The respondent made the task of the trial magistrate more difficult when he failed to produce the initial medical treatment documents and the X-ray that Dr. Kiamba allegedly used to write his medico-legal report.

In her judgment, the trial magistrate did not mention the difference of opinion between the medical report of Dr. Kiamba and that of Dr. Otara. She did not therefore resolve the inherent contradictions in the said medical reports. Having carefully perused the said two medical reports, this court is unable to uphold either the medical report of Dr. Kiamba or that of Dr. Otara in the absence of other supporting documentary evidence. The injuries noted in the two reports are completely at variance that it would be unconscionable in the circumstances to uphold either medical report.

I have anxiously considered the dilemma that this court now faces as a result of the decision by the parties to this appeal to ignore the established procedure of the court that requires a party to offer oral testimony in support of his claim when claiming damages on account of the injuries that he alleges to have sustained. I will resolve the dilemma in the only way allowed by the law. I will allow the appeal, set aside the judgment and decree of the trial magistrate and remit the case to be heard afresh before a magistrate of competent jurisdiction other than J. Thuita, the Principal Magistrate who heard the case that

this appeal arose from. Since both parties were equally to blame for the dilemma that is now evident, there shall be no orders as to costs. Each party shall bear its own costs.

**DATED at NAKURU this 23<sup>rd</sup> day of November 2007**

**L. KIMARU**

**JUDGE**