



REPUBLIC OF KENYA

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

**Civil Appeal 209 of 2001**

**PAN AFRICAN PAPER MILLS ..... PLAINTIFF**

**VERSUS**

**JEREMIAH MABONGA MABONGA ..... RESPONDENT**

***[Appeal from the Judgment of the Senior Principal Magistrate dated 29<sup>th</sup> October, 2001  
(read and delivered on the 2<sup>nd</sup> November, 2001) in Nakuru Chief Magistrate's Court Civil  
Case No. 1940 of 1999]***

**JUDGMENT**

The appellant M/S Panafrican Paper Mills (E.A) Limited has appealed against the above judgment. By a judgment delivered on 2<sup>nd</sup> November, 2001, by the Senior Principal Magistrate the appellant was held 100% liable of the accident suffered by the Respondent on 30.7.1994. On the issue of quantum general damages for pain and suffering and loss of amenities were assessed for the Respondent in the sum of Kshs.400,000/- plus special damages of Kshs.2,000/- making a total of Kshs.402,000/- less the amount paid under Workman's Compensation Act of Kshs.208,000/- leaving a balance of Kshs.193,992/- with costs and interest at court rates.

The appellant being dissatisfied with the said award has filed this appeal and raised the following grounds of appeal;

***1. The learned Magistrate erred in fact and in law and misdirected himself on the evidence of payment to the plaintiff by the defendant made in settlement of all claims and in particular:***

***i. the learned Magistrate failed to give concise statement of the case relating to the payment and failed to determine and give reasons for disregarding the evidence relating to the payment,***

***ii. the learned Magistrate misdirected himself in holding and treating the payment as payment under the Workman's Compensation Act which it was not,***

***iii. the learned Magistrate misdirected himself in disregarding that payment to the plaintiff by the defendant was in discharge of all liabilities and further erred in fact and in law in disregarding the contents of the discharge voucher .....***

**iv. the learned Magistrate erred in ignoring that the said payment which was acknowledged by the plaintiff was in settlement of the claim and no further payment was due to the plaintiff.**

**2. The learned Magistrate erred in fact and in law in failing to give concise statement of the case, the point for determination and reasons for his decision on the issue of liability and in particular ignored that the plaintiff had failed to prove negligence as pleaded in the plaint and he ignored the issue of contribution.**

**3. The learned Magistrate erred in disregarding submissions on behalf of the appellant.**

**4. The learned Magistrate erred in disregarding the authority submitted by the defendant and the damages awarded by the learned magistrate.**

These grounds were further buttressed by the counsel for the appellant during the hearing of the appeal.

Specific emphasize was attached to a document titled discharge voucher which is dated 18<sup>th</sup> October, 1996 wherein the respondent received a sum of Kshs.232,360/- in full and final settlement of all claims, past, present and future against the appellant in respect of injuries sustained out of the accident on 30<sup>th</sup> July, 1994.

This Discharge Voucher was witnessed by Jeremy Mabonga and Francis Waswa, both employees of the appellant.

According to counsel for the appellant the trial court ought to have dismissed the respondent's claim as this payment was not in respect of the Workman's Compensation. There is no indication showing that it was payment for Workman's Compensation.

I have carefully considered this aspect of the appeal with anxious mind. It is noteworthy, the discharge voucher is for the payment of Kshs.232,360/- and yet the payment cheque that the respondent received was for Kshs.208,008/-. Although the appellant's personnel officer tried to explain the discrepancy in respect of the sum paid in his evidence, if there was any clarification to be made the same should have been clearly spelt out in the discharge voucher. The appellant having interfered and derogated from the terms of agreement by deducting some money under the discharge voucher they have only themselves to blame when the respondent on his part termed the payment part payment under the Workman's Compensation that did not take into account general damages and loss of amenities.

There are certain aspects of the same discharge voucher that are also disturbing. The payment is indicated was to be made to the respondent C/O G. P Wekullo & Co. Advocates. Was the respondent represented by this firm of Advocates? If so why was the payment passed to the respondent through the window in what would appear a clandestine manner whereby the respondent was not even given a copy of the Discharge Voucher? If the respondent was represented by a lawyer why was it the payment was made through a lawyer? It is for the above reasons that I will not disturb the judgment of the lower court on the issue of the payment of Kshs.208,008/- and therefore consider this payment as part payment under Workman's compensation.

This is not the end of the matter as this court has to consider the issue of whether the appellant was negligent and if so whether the respondent contributed to the negligence. Counsel for the appellant urged this court to find that the appellant was not negligent. He referred to the portion of the respondent's evidence where he admitted that he was working on a defective machine and he knew he was working in a dangerous situation and as an experienced workman he knew what he was required to do. In this regard the principle of *volenti non fit injuria* should apply. I have carefully considered this aspect of the appeal. It is clear that the respondent started

working with the appellant in 1974 and as at the time this fate befell on him on 30.7.1994 he had worked for 20 years. No doubt the respondent was well experienced although he was not a qualified engineer he states in his evidence under cross examination as follows:

***“I was assigned the work by mechanical maintenance supervisor, the late Philip Mwakende. I was assigned the machine because it was defective. It was not my first time to repair the said machine. I used to do it alone. I had the experience of repairing the machine. It was not my first time to pull the agitator. Yes, the caustic splashed into my eyes when I pulled the sling. Yes, I knew the place, I was working was a dangerous place. The cautionary steps I took were to wear the overall and hang up the agitator.”***

I have also taken into account the evidence by the respondent that the appellant ought to have provided him with protective mask and 3 men to lift the metal. In this regard the appellant should have the higher responsibility and contribution to the negligence. However due to the respondent's experience I would apportion the liability at the proportion of 85% to be borne by the appellant and the respondent 15%.

On the issue of quantum I have re-evaluated the evidence, the medical reports, the fact that the respondent lost his employment due to this injuries, the loss of amenities and the case law that was presented. For these reasons I am also guided by settled principles that the assessments of damages are left to the discretion of a trial court and an appellate court will not disturb the award of damages:

***“Unless so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low”***

***Butt v Butt (1977) KAR (See Kenya Bus Services Ltd vs Humprey 2003 KLR 671.***

I am satisfied that the learned Senior Principal Magistrate did arrive at the correct assessment of Kshs.400,000/- as general damages and Kshs.2000/- as special damages. For the foregoing reasons, this amount shall be deducted by 15% being the contribution and the judgment of the lower court is hereby substituted by the following judgment for the respondent at Kshs.402,000 less 15% contribution i.e. Kshs.341,700/- less the sum of Kshs.208,008/- which was already paid leaving the balance of Kshs.133,692/- with costs and interests including 50% costs of this appeal.

**JUDGMENT READ AND SIGNED ON 24<sup>TH</sup> MARCH, 2006**

**M. KOOME**

**JUDGE**