



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Appeal 6 of 2003

SAMSON EMURU.....APPELLANT

*VERSUS*

OL SUSWA FARM LTD.....RESPONDENT

**J U D G M E N T**

This is an appeal from the Judgment of the Resident Magistrate in Naivasha Civil CaseNo.214 of 2002 given on 28<sup>th</sup> November, 2002 (L.K. Mutai). Judgment was entered for the respondent in the sum of Kshs.300,000/- less 5% contributory negligence leaving a balance of Kshs.285,000/- with costs and interest.

The appellant being dissatisfied with the above Judgment has appealed to this court.

In the Memorandum of Appeal, the appellant raised four grounds of appeal but during the hearing of the appeal Counsel for the appellant abandoned the 4<sup>th</sup> ground of appeal and relied on three grounds of appeal namely:-

**1. The learned trial magistrate erred in Law and**

**in fact in holding the Appellant liable at 95%**

**when the evidence on record adduced by the**

**Respondent himself failed totally to sow in**

**which way the Appellant was negligent and**

**did not support the particulars of negligence**

**pleaded at all.**

**2. The learned Magistrate erred in Law and in**

**Fact the Appellant liable, in the light of the**

**documentary evidence adduced which**

**showed that the Respondent was to blame for the accident.**

**3. The learned trial Magistrate erred in not ascribing full negligence to the Respondent as available evidence of the alleged accident indicated that the Respondent was the Principal author of the accident and the learned trial Magistrate's finding on the key issue of negligence was biased and totally unsupported and has resulted in miscarriage of justice.**

In the case that gave rise to this appeal, the Respondent claimed that on the 6<sup>th</sup> day of May, 2002, the Respondent who was an employee of the appellant in the normal course of his employment of making animal feed using a mill, the appellant provided him with unsafe system of work, that caused him to slip and as a result his right hand fell into the mill thereby occasioning him serious bodily injuries.

The particulars of negligence by the appellant were cited as follows:-

- a) Requiring the plaintiff to work in an unsafe place.
- b) Providing inadequate supervision at work.
- c) Providing an unsafe system to work under.
- d) Failing to service the mill.

The particulars of injuries suffered by the Respondent as a result of the said injury was an amputation of the right hand at the wrist joint.

After a full hearing, Judgment was entered for the Respondent as stated above.

I now wish to consider and evaluate the several issues that were canvassed before this court.

### Negligence

First, Counsel for the appellant argued that the learned trial Magistrate erred by not awarding a higher proportion of liability on the Respondent. The Respondent admitted that he knew he was stepping on waste and therefore this was enough cause for the Respondent to shoulder a higher percentage of blame than 5%.

According to the evidence, the Respondent was operating the machine when the accident occurred, there was dirt that had accumulated next to the machine and as at the time the accident occurred the Supervisor Bernard Wambua, PW2 had gone to assist in another site that he was also supervising. It was argued by Counsel for the Respondent that the appellant had a common law duty of care of his employee. The appellant had a duty to provide a safe place of work and as stated in the Textbook by Charlesworth on Negligence 4<sup>th</sup> Edition page1036:-

**“the duty of employers to provide the servant with a safe place of work not merely to warn against unusual dangers known to them,... but also to make the place of employment... as safe as the exercise of reasonable skill and care would permit...The duty thus described is a higher...the master is under a duty to make his servants to take reasonable steps to avoid harm arise...”**

The point that was raised which is of relevance to the above is “who was to blame for the accident.”

According to the evidence by the Defence, Samuel Enduny, DW1 said the appellant was to blame for the accident. During cross-examination this witness said:-

**“I blame the defendant for the accident. The**

Plaintiff had the experience and he had been

**allowed by the defendant to run the machine...**

**Our supervisor was Wambua. He was allocating duty he had left the scene at the time of the accident.”**

Bernard Wambua, DW2 blamed the Respondent for the accident.

He claimed he did not allocate him the duties of working with the machine. The issue of whether the Respondent allocated himself duties against the authority of his Supervisor and the appellant was not pleaded by the appellant in the defence. The particulars of the Respondent’s negligence as stipulated in the defence, does not at all indicate that the defendant was not allocated the duties he was undertaking when the injuries occurred.

In any event the evidence of DW2 is contradicted by that of DW1 who state that it is normal for the Respondent to operate the machine and assisting each other was not illegal. The Supervisor knew that it was normal for workers to assist each other.

The provisions of Order VI Rule(3)(4) clearly spell out the formal requirements of matters that must be pleaded. Failure to plead this aspect, the appellant therefore failed to notify the other side and thus took the Respondent by surprise.

The importance and object for ensuring that the pleadings provide a brief summary of the case of each party is also articulated in the Text book by ***Bullen and Leake and Jacob's 12<sup>th</sup> Edition*** page 8.

**“As the parties are adversaries, it is left to each of them to formulate his case in his own way, subject to the basic rules of pleadings... For the sake of certainty and finality, each party is bound by his own pleading and cannot be allowed to raise a different or fresh case without due amendment properly made.”**

On this issue raised by the appellant which was not pleaded, I am of the view it was an afterthought and an ambush on the part of the respondent.

As regards the issue of apportionment of liability, the principles upon which the appellate can interfere with the decision of the trial court are well settled in various Court of Appeal decisions. (See the case of ***KARANJA –VS- MALELE*** [1983] KLR page 142).

**“Apportioning of blame represents an exercise of discretion with which this court will interfere only when it is clearly wrong or based on no evidence or on the application of a wrong principle.”**

Similarly on the issue of assessment of damages the principles are well settled, although it would appear the appellant abandoned he fourth ground of appeal. Thus I find the trial court properly considered the injuries suffered by the Respondent against the cases of comparable injuries. In any case:-

**“An appellate court will not disturb an award of damages unless it is 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 inordinately high or low.”**

(See the case of ***Butt -Vs- Knin*** [1982-1988]Vol. I KAR 1).

For the reasons stated above, the material that was presented before the trial court, clearly shows the respondent was lawfully employed, the appellant failed to provide him with a safe system and condition of work and supervision.

I am satisfied that the trial magistrate was right in apportioning the liability at the ratio of 95% to 5%.

This appeal fails. It is accordingly dismissed with costs.

It is so ordered.

Judgment Read and Signed on 28<sup>th</sup> April, 2006.

MARTHA KOOME

JUDGE

28.4.2006