



REPUBLIC OF KENYA

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

**Civil Appeal 211 of 2003**

**KHILNA ENTERPRISES LTD ..... APPELLATE**

**VERSUS**

**CHARLES MAINA MIGWI ..... RESPONDENT**

**(Appeal from the judgment of Alex Anambo Resident Magistrate Thika Civil Case**

**No. 1179 of 2001 delivered on 25<sup>th</sup> day of March 2003**

**BETWEEN**

**CHARLES MAINA MIGWI ..... PLAINTIFF**

**VERSUS**

**KHILNA ENTERPRISES LIMITED ..... DEFENDANT**

**JUDGMENT**

**I: BACKGROUND OF APPEAL**

1. The relationship between the parties is one of master/servant. On the 24 June 2000, the original plaintiff was asked to wash a canvas to a lorry belonging to his employer. He would often do this and at least once a week. On the material day the plaintiff was returning the canvas when he slipped and fell from the lorry and sustained injuries to his left ulna distal that was fractured together with radial styloid process that was also fractured.

2. The original/plaintiff sued the employer/defendant. After hearing the trial the magistrate found that liability was at 70% and 30% ratio from of the plaintiff. The 30% was apportioned against the plaintiff.

3. An award of Ksh.100,000/- was given for general damages. Special damages was not disputed.

**II: Appeal**

4. Being dissatisfied with this decision the employer/defendant appealed to this High Court.

5. The grounds of appeal being basically on the issue of liability. That the original plaintiff had stated in cross-examination that he stepped on a bar. That bar was said to be loose. This evidence was never pleaded and as such no liability should have been found against the defendant.

6. In response, the advocate for the respondent stated the issue of liability was apportioned and as such the issue of liability was fair. She only took issue on quantum stating it was too low.

### III: Findings

7. My finding on liability is that the original plaintiff was on official duty employed by the defendant. It was the defendant's duty to ensure that he was well equipped to do his work and to ensure that his employees are working in a safe environment. That duty of care is upon the employer.

8. Taking issue with a loose bar does not help his case. The fact remains that the original plaintiff fell from on top of the lorry.

9. The trial magistrate found that 30% contribution be borne by the original plaintiffs. I would agree with this and do not find the need to interfere with the issue of liability.

10. As to quantum – I believe for the fracture a sum of Ksh.100,000/- was adequate. The respondent original plaintiffs' advocate seeks a higher sum to be awarded. In order to do this she required to file a cross appeal which she failed to do. Nonetheless even if she had the amount sought for it is too ordinally high.

10. a I wish to state that the authority filed are digest on extract. These should not be used in court. See Section 90 Evidence Act.

11. I wish to note that the decision of the trial magistrate was fair in the circumstances.

12. This appeal stands dismissed with costs to the respondent/original plaintiff.

Dated this 18<sup>th</sup> day of May 2006 at Nairobi.

M.A ANG'AWA

JUDGE

R.K. Muriungi advocate for the appellant

K.K. Macharia holding brief for C.K. Mwihi & Co. Advocates for the defendant