



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

Civil Appeal 249 of 2004

AMALGAMATED SAW MILLS LTD.....APPELLANT

VERSUS

DANIEL WAIREGIKARURI.....RESPONDENT

J U D G M E N T

This is an appeal from the Judgment of Senior Resident Magistrate, Molo CaseNo.274 of 2003 (Hon. G. Kirui) given on 24th September, 2004.

Judgment was entered for the respondent in respect of general damages at Kshs.100,000/- with costs and interest.

The appellant being dissatisfied with the above Judgment appealed to this court. In the memorandum of appeal, the appellant raised the several grounds of appeal which were argued together by Counsel for the appellant during the presentation of his appeal.

It was the respondent's case that on 17th September, 2002, while working for the appellant as a casual labourer while operating a sawing machine the saw broke and while he was trying to run away he fell on a piece of timber which hit and injured him on the chest and right knee. The respondent blamed the accident on the failure by the appellant to provide him with protective guards such as gum boots and for failing to maintain the machine. The respondent relied on his own evidence and produced medical reports by Doctor Omuyoma and Doctor Malik which reports were produced by consent. Dr. Omuyoma's report was compiled on 18th November, 2003, and according to this report, the respondent sustained a permanent scar on the chest of about 4cm long.

The report by Dr. Malik is completely at variance with that of Dr. Omuyoma as it is noted:-

“ The Doctor who compiled the first medical report has produced the erroneous details from the medical card and states that ”he has a permanent scar on the chest. The scar is about 4 cm long” Examination of the chest today reveals no such scar.”

Due to this disparity in the two medical reports, it would have been useful to call the doctors to clarify the differences (See the case of *Cecilia W. Mwangi & Another –Vs- Ruth W. Mwangi, Civil Appeal No.251 of 1996*).

The note issued to the respondent when he allegedly sought treatment after the injury at the local health

centre was not admitted and the maker was not called by the respondent to produce the same and give evidence.

On the part of the defence, Maurice Aloo who gave evidence and produced the record register where they used to register all the accidents denied that any accident occurred as alleged by respondent. According to this witness no accident was recorded on that material date and thus he contended the respondent was not injured. However, during cross-examination this witness admitted that he was not working in the same department with the respondent and the respondents Supervisor was Josephat Githui and he did not know whether the respondent reported the accident to his superior.

The above is the summary of the evidence upon which the trial court entered Judgment that is now the subject of appeal.

According to counsel for the appellant, there was no evidence to prove that an accident occurred and that the respondent was injured while at the place of work. Moreover there was no proof of negligence on the part of the appellant on which the trial court based liability at 100%.

Secondly, counsel for the appellant argued that no medical or treatment record was produced by the respondent during the trial, the treatment card was merely marked for identification and the maker was never availed to produce it as an exhibit. The only medical report that was produced by consent was the report by Dr. Omuyoma and prepared on 18th November, 2003, and a report by the appellant's doctor prepared on 28th January, 2004. As mentioned above the report by Dr. Malik is completely at variance with that of Dr. Omuyoma as he states that the examination of the respondent reveals no such scar on the chest. In his opinion the respondent suffered partial incapacity of a temporary nature for a period of one day. He suffered no permanent disability.

On the part of the respondent Counsel opposed the appeal on the grounds that the respondent was able to prove his case to the required standard and that the evidence of the respondent was never rebutted by that of the appellant. Counsel for the respondent drew the attention of the court to the only evidence of the appellant's witness who confirmed that the respondent was an employee of the appellant. This witness said the respondent worked for 8 hours on the material day and produced the master roll, on cross-examination this witness said he was not in the same department with the respondent and he did not know the people who were working with him at the material time. Due to these contradictions, Counsel argued that the evidence of the appellant's witness was worthless and the appeal should be dismissed.

I have carefully reevaluated the evidence and the Judgment the subject of this appeal as it is the duty of the first appellate court to subject the entire evidence to its own consideration and arrive at its own judgment while bearing in mind that this court never saw or heard witnesses and make due allowance for that.

It is not in dispute that the respondent was working at the appellant's premises as an employee on the material day. What is in dispute is whether he was injured, and if so the extent of injuries, and whether the appellant as an employer of the respondent was liable for the injuries, and if so, to what extent is the appellant liable.

The respondent stated in his evidence that he was operating a sawing machine when the electric machine broke and as he tried to run away he was hit by a piece of timber which injured him on the chest and the right knee. He blamed the appellant for failure to provide him with protective gear such as gum boots and for failure to maintain the machine.

This issue of whether the appellant was negligent was not controverted by the appellant. No evidence was adduced to show that the appellant was not negligent or that there was no breach of duty of care on their part. The Respondent gave evidence although scant that the machine malfunctioned and while he was trying to escape from injury he was hit by a piece of wood.

In this regard therefore, I am satisfied the appellant failed to provide the respondent with a safe working

environment and protection from the injuries such as the ones he suffered while trying to escape from the defective machine and thus in the absence of any evidence to the respondent's contribution to negligence I find that the trial court properly apportioned total liability upon the appellant.

On the issue of quantum, the respondent did not avail a the evidence of the Clinical Officer who treated him at the health centre. The medical reports prepared by Dr. Omuyoma and Dr. Malik are at variance.

The learned trial Magistrate while relying on the two reports found that the respondent sustained severe lacerations on the chest and multiple bruises on the right knee joint which were assessed as "harm".

The report of Dr. Malik does not lead to the above findings. The Trial Magistrate relied only on the report of Dr. Omuyoma. The learned trial Magistrate should have considered both reports which were produced by consent.

Going by the evidence of the appellant's witness that the respondent was able to report to work even the following day, and considering the report by Dr. Malik that the respondent suffered temporary incapacity for only one day, it seems obvious that the respondent suffered soft tissue injuries.

This being an appellate court it is undesirable to interfere with the trial court's discretion in assessing general damages unless it is proved that the said trial court proceeded on the wrong principles of the law or that it awarded damages that are inordinately high or inordinately low as to amount to an entirely assessment estimate for the amount awarded. (See the case of **Kitori V-Vs- Coastal Bottlers Ltd [1985] KLR 56 and Hassan -Vs- Nathan Mwangi Kamau Transporters**).

In the present case it is clear the general damages awarded by the trial court were inordinately high considering the injuries that the respondent sustained, that is soft tissue injuries.

The respondent did not prove the permanent disability suffered, and there is doubt whether any scar was sustained. Both reports did not note any permanent disability. The trial Magistrate therefore applied the wrong principles of the law in assessing the damages that he awarded. The award of Kshs.100,00/- by the lower court is too high and I consequently set the same aside and substitute it by an award of Kshs.50,000/-.

I have been guided in this assessment by the decision in the case of **John Otieno Ojwok -Vs- Samuel Onyango Aleny & Another, HCCC No.2001 of 1992** (unreported) where the plaintiff sustained similar injuries as the respondent in this appeal and while taking into account the aspect of inflation.

The appellant shall have half of the costs of this appeal. The respondent shall have the costs of the suit in the lower court with interest from the date of the Judgment by the trial court.

It is so ordered.

Judgment Read and Signed on 5th May, 2006.

MARTHAKOOME

JUDGE