



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

**Civil Appeal 56A of 1999**

**BALDER KAUR MANN.....  
.....APPELLANT**

**VERSUS**

**ROBERT BILINDI WEKALAO.....  
.....RESPONDENT**

**JUDGEMENT**

This is an appeal from the decision of K. Ngeno Esq. Resident Magistrate in Eldoret SPM Court Civil Suit No. 1720 of 1997, in his Judgment, delivered on 2/6/1999. In his Judgment the learned TRIAL magistrate found the appellant, (who was the defendant in the subordinate court), liable in negligence and awarded the respondent (who was the Plaintiff in the subordinate court) general damages of Kshs.230,000/=, special damages of Kshs. 5,761.97, costs and interests. The appellant, being aggrieved by the decision of the learned trial magistrate has appealed to this court and has listed 9 grounds of appeal, that-

1. The learned trial magistrate erred in law and fact in holding the appellant negligent and/or in breach of statutory duty without any evidence in support of such at the hearing.
2. The learned trial magistrate erred in law and fact in failing to address the overwhelming defence evidence on record in his judgment and instead placed reliance on the Plaintiff's unsubstantiated oral evidence.
3. The learned trial magistrate erred in law and fact in awarding general damages to the plaintiff who if injured was injured on a frolic of his own and not in lawful course of his employment.
4. The learned trial magistrate erred in law and fact in failing to take account of the defendants submissions.
5. The learned trial magistrate erred in law and fact in failing to address himself to the fact that the plaintiff had failed to file a reply to defence to traverse the allegation on negligence levelled against him hence is deemed to have admitted being negligent.

6. The learned trial magistrate erred in law and fact in holding that the plaintiff was hurt while in the defendant's duty when there was clear evidence by the defendant to the contrary.
7. The learned trial magistrate erred in law and fact in failing to hold the respondent negligent and solely responsible for the accident in issue inspite of availability of evidence in that regard.
8. The learned trial magistrate erred in law and fact in using wrong principles in assessment of damages.
9. The learned trial magistrate erred in law and fact in awarding damages which were inordinately excessive and exaggerated as to amount to erroneous estimate of the loss suffered by the respondent, if any.

At the hearing of the appeal Mr. Kuloba for the appellant

argued the nine grounds as two grounds, that is liability and quantum. He abandoned the ground on failure to reply to defence. He submitted that though the respondent testified that the driver braked suddenly and the door was flung open, he admitted that he was the one who closed the door. Also, it was unbelievable that the respondent would have fallen out of the driver's cabin and the driver would continue with the journey. In his view the version of the driver was the correct one. The driver's version was that he had carried two turn-boys in the driver's cabin, none of whom was the respondent. Therefore there was no basis for the magistrate's finding that the respondent fell from the vehicle. The magistrate also did not make a finding on negligence or a finding that the door was defective or that the driver caused the door to open. The magistrate should not have treated this as a case of strict liability. He submitted that the learned magistrate did not comply with the legal requirements in writing the Judgment.. On quantum, he submitted that an award of damages of Kshs.100,000/= would be adequate as the injuries suffered had healed. The award of Kshs.230,000/= as general damages was excessive.

Mrs. Kitony for the respondent submitted that the findings of the learned magistrate were based on evidence and demeanor of the witnesses. The appellant was on duty. The magistrate found that DW1 was not truthful. On quantum, she submitted that there was permanent disability of the leg of 17%, scars of 3% and permanent dislocation of ankle at 5%, making total permanent disability of 25%. This was as per the report of Dr. Lodhhia, who was the doctor appointed by the appellant. The award of Kshs. 230,000/= as general damages was reasonable. The court gave reasons for its findings.

Though Mr. Kuloba argued the point that the learned magistrate did not comply with the legal requirements in writing a judgment, that was not a ground of appeal. I will therefore ignore that submission.

In brief the facts of the case were that on the material day, which was 3/3/1997, the respondent was employed by the appellant as one of the turn-boys for lorry registration KXD 126 Isuzu and was to work at Eldoret. His task was to assist in loading the lorry with firewood. The lorry driver was one Jacob Koech (DW1). The lorry was to take logs to CPC factory at Eldoret.

According to the respondent (PW1) he sat in the drivers cabin with (DW1) and two other turn-boys when the lorry was proceeding with firewood to CPC factory. The driver then braked and the door of the lorry suddenly opened and he fell and got injured. He only recovered consciousness when he was at hospital. DW1 denied this version of the respondent. According to (DW1) he was with only two turn-boys in the cabin. He left the respondent at the place where they loaded the logs. He did not carry the respondent on the way back to CPC factory. If the respondent fell from the lorry, then he must have climbed the lorry on the firewood logs at the back of the lorry.

On the above evidence, the learned magistrate found the appellant liable in negligence and awarded the respondent general damages of Kshs.230,000/=. The appellant has consequently appealed to this court.

The evidence of the respondent (PW1) was that he fell from the cabin of the lorry and got injured.

The evidence of DW1 was that the respondent was not in the cabin of the lorry, and that he left the respondent behind at the point where the logs were loaded.

Mr. Kuloba has argued that there was no proof that the respondent fell from the cabin of the lorry or proof of negligence on the part of the appellant or his driver, and that the magistrate did not make specific findings on negligence. Mrs. Kitony has argued that negligence was established.

The learned magistrate, in considering the evidence on how the accident occurred, had this to say in the judgment -

“That the Plaintiff was in employment is not in dispute. Neither is the fact that he was injured. I have examined the evidence of DW1 probably lied to save (sic) his skin. What comes out clear is that Plaintiff was injured. What I believe (sic) from the evidence before me is that the DW1 had his 3 turn-boys at his cabin and when the plaintiff fell off he decided to ignore him. Otherwise how would he tell DW2 that Plaintiff was behind the lorry not in the driver’s cabin then tell the court that he left the Plaintiff at Navillus estate. DW1 is just one big liar. He left his injured co-worker unattended”.

It is clear from the above, that the learned trial magistrate disbelieved the evidence of (DW1). He considered that he was liar who was trying to save his skin. He relied on a finding of contradiction that DW1 told the court that the respondent was left at Navillus while he had earlier told DW2 that the respondent was sitting at the back of the lorry.

I have perused the evidence on record. I find no evidence that DW1 told DW2 that he knew that respondent was sitting in the back of the lorry. According to DW2, one of the three workers would be left behind together with firewood. He had this to say in evidence:-

“One conductor will be left at the field to gather fuel-wood and return with two. One will then be left in town and the other goes back with the driver to the field. When the lorry is full it would be risky for one to sit on the wood-fuel”

The finding of the learned magistrate that DW1 gave a conflicting story to DW2 and to court has no basis on the evidence on record.. It was an error. The story about the respondent sitting at the back of the lorry is the testimony of DW2 in cross examination. It referred to the time when the lorry was leaving to go and collect the logs at Navillus. DW2 said he was present and stated in evidence that –

**“When the group left for duty two turnboys sat and plaintiff was at the back of the lorry”**

The burden was on the plaintiff to establish how he was injured on the balance of probabilities. He testified that he was sitting in the driver’s cabin with two turn-boys by name Simiyu and Robert. He did not call them or any of them as a witness. Nor did he indicate to court whether he found it difficult to call them. Calling them would corroborate his story on how he was injured, and possibly impute negligence on the appellant. He should have called those witnesses to prove his case on the balance of probabilities. He did not do so. I find that the respondent did not establish his case of negligence against the appellant on a balance of probabilities. With due respect to the learned magistrate, it is my view that liability in negligence against the respondent was not proved to the standards required by law. On that reason this appeal has to succeed.

I now turn to the issue of quantum of damages awarded.

Mr. Kuloba has argued that the general damages of Kshs.230,000/= awarded by the learned trial magistrate were excessive. He suggests a figure of Kshs.100,000/=. Mrs. Kitony has submitted that permanent disability was found to be 25%. Therefore the figure of general damages was justified.

The award of general damages is the discretion of a trial court. An appellate court, will be slow to interfere with the quantum of damages awarded by a trial court unless it is satisfied that the trial court applied the wrong principles, such as by taking into account some irrelevant factor or leaving out of

account some relevant one, or that it misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate (see *Kemfro –v- A.M. Lubia* (1982) 1 KLR 727).

The injuries suffered by the respondent have healed.

Dr. Lodhia, who was the doctor appointed by the appellant's lawyers, found permanent disability of 25%. The injuries were partial loss of right leg; scars of skin of left leg; injury to the left shoulder; injury to the left ankle; injury to the right hip joint; and injury to the right back. I have not been referred to any specific misdirection by learned trial magistrate in assessing damages, and I have not found any. Mr. Kuloba has not laid any basis for the proposed figure of Kshs. 100,000/= as general damages. In my view, the amount of general damages awarded by the learned trial magistrate was reasonable, considering the injuries suffered. If the appeal were successful, I would uphold the quantum of general damages awarded by the learned magistrate. However, I have already decided that the appeal will be allowed because the respondent did not prove negligence against the appellant.

For the above reasons, I allow the appeal and set aside the award of the learned magistrate. As this is a case between an employer and employee, I order that each party will bear their respective costs of this appeal as well as the proceedings before the trial magistrate.

Dated and delivered at Eldoret this 12<sup>th</sup> day of June 2006

George Dulu

Judge

In the presence of -