



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

**AT NAIROBI**

**CIVIL APPEAL NO 234 OF 2001**

**RONALD NGARA ONCHANGU ..... APPELLANT**

**VERSUS**

**COSMOS LIMITED ..... RESPONDENT**

**JUDGMENT**

**(An Appeal from the Judgment of Hon. J. W. Lessit, CM in Nairobi Milimani Commercial Courts**

**SRMCC No 3283 of 2000 delivered on 20th April, 2001).**

On 2nd July, 1999 the Appellant (Plaintiff in the lower court) was injured in the course of his employment with the Respondent while pushing a trolley full of pharmaceutical products. As he pushed this trolley, assisted by two other co-workers, the trolley ran over his foot, causing him injuries. He filed an action in the lower court, blaming the accident on his employer who he said, among other things, was negligent in not providing a safe place of work, for failing to provide adequate precautions for his safety, exposing him to risk of injury, and failing to provide him protective gear.

In an extensive and well considered Judgment, the trial court (Hon. J W Lessit, CM) found the Appellant to substantially blame for the accident, holding that the employer was only 20% liable, and awarded him a sum of Kshs.150,000/= for general damages, and Kshs.1,500/= specials (both subject to 80% deduction). It is against that Judgment that the Appellant has preferred this appeal, citing the following 5 grounds of appeal:

***(a) THAT the learned trial magistrate erred in law and in fact in failing to consider adequately or at all the evidence placed before her.***

***(b) THAT learned trial magistr ate erred in law and in fact in finding the Appellant 80% liable against the weight of evidence.***

***(c) THAT the learned trial magistrate erred in law and in fact in awarding a sum that was inordinately lower in the circumstances.***

***(d) THAT the learned trial magistrat e erred in law and in fact in coming to the conclusion that she did without any or any good reason or sufficient cause.***

***(e) THAT the learned magistrate erred in law and in fact in failing to take into account the Appellant's submissions filed on 10 th April, 2001.***

In his submissions before this Court, Mr Orange, for the Appellant, argued that the trial court erred in holding the Appellant 80% liable when the Respondent had conceded 40% liability; that the Appellant's evidence that he was not given protective gear, that the trolley was defective, and that not enough support labour had been given to push the trolley, had not been taken into account.

On quantum, he submitted that in view of the serious nature of the injuries, award for general damages should not have been less than Kshs.200,000/=.

Mr Kavoi, Counsel for the Respondent, argued that the trial court had properly evaluated the evidence and found on a balance of probability the Appellant 80% liable; that the lower court's findings on apportionment should not be interfered with except in very special circumstances (See *Khambi vs Mahithi (1969) E A 70* ; that the Respondent had not "conceded" any blame; that the injuries here were not serious and accordingly the award should not be interfered with (See *Chanan Singh vs Chanan Singh & Handa (1955) E A 125* and *Bashir Butt vs Uwais Khan (1982 – 88) I KLR* .

I have carefully perused the record of the lower court and considered the submissions made by both parties, both in the lower court, and here, and I do not see any reasonable ground to interfere with the decision of the lower court. It is settled law that he who alleges must prove. In a civil matter the claimant is required to prove his case on a balance of probability. Now, let us see how the Magistrate treated the evidence before her in relation to the particulars of negligence pleaded. She delivered herself as follows.

**“On these four pleaded particulars of negligence only evidence which Plaintiff gave that could touch on them was remote. His case in court was that the trolley was not safe, not in good condition and was overloaded it was not pleaded. On that the defendant's case was that not only was the trolley in a good condition but was also carrying a load that was less its capacity. The last pleaded negligence against the defendant was that the Plaintiff was not provided with any protective wear. On that point the defendant's case was that it did provide the Plaintiff with protective gear but that he failed to wear them.**

**The defendant has pleaded several particulars of negligence against the Plaintiff which are that the Plaintiff failed to take care of his safety failed to observe and follow normal directions failing to control the trolley to prevent it running on his foot and handling the trolley without care and attention. The defendants adduced evidence to show that in fact the Plaintiff pulled the trolley and that the sole cause of the accident was his failure to remove his left foot on time to avoid the trolley over running his foot.”**

The Magistrate further found that the injury was consistent with her finding that the trolley ran over the Appellant's foot because of his failure to remove it in time.

With regard to protective gear, this is what the trial court said:

**“the issue of protective gear is not elaborated and neither was it shown which wear could have prevented the injury suffered by the Plaintiff”.**

Finally, the trial court found the employer 20% to blame for not providing enough manpower to assist the Appellant push the trolley. The trial court's findings are consistent with the evidence before the Court. This case had simply not been proved on a balance of probability. Except for its failure to provide sufficient number of people to help push the trolley, no other allegations of negligence were established. Of course, the employer is expected to take reasonable steps to ensure the employee's safety. However, he is not expected to watch over him constantly (See *Woods vs Durable Suites Limited (1953) 2 ALL E. R. 391* .

Having evaluated the evidence before the lower court, I find no good reason to interfere with the apportionment of liability made by the Hon. Magistrate. I find that the Respondent had not "conceded" to 40%; in fact the Respondent had asked for the entire case to be thrown out, and only in the alternative requested a 60 – 40 split. The court's apportionment, based on evidence, is not manifestly erroneous.

With regard to quantum, I do not find the award to be inordinately low, or based on wrong principles of law, or against the weight of evidence. Accordingly, I hereby dismiss this appeal with costs to the Respondent.

Dated and delivered at Nairobi this 15th day of February, 2005.

**ALNASHIR VISRAM**  
**JUDGE**