



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

Civil Appeal 624 of 2000

**NDUMBERI DAIRY FARMERS CO-OPERATIVE SOCIETY LTD
APPELLANT**

VERSUS

BONIFACE KINYANJUI MUTHEE RESPONDENT

**(An Appeal from the Judgment of Hon. M. A. Mlangi, RM in
Kiambu Civil Suit No. 530 of 1999 delivered on 30th October 2000)**

JUDGMENT

By a Plaint dated 19th November, 1999 and filed in the lower court on 23rd November, 1999, the Respondent (Plaintiff in the lower court) claimed damages from the Appellant, his employer, for personal injuries sustained in the course of his employment when he fell on an electric motor at his work premises. The Respondent was a watchman with the Appellant, and at the material time was guarding the premises. According to his evidence, at about 8.30 pm on 19th June, 1997, while patrolling the premises, he entered into a store housing a cooler machine with a motor and compressor.

On it was a sack. He attempted to uncover the machine by removing the sack. Just as he did that, the machine, which had a running motor, caused him to pull forward, and he fell down, injuring himself, and mainly his middle finger, which was eventually amputated. In its Defence dated and filed 4th January, 2000, the Appellant denied liability on the ground that the Respondent exceeded his authority and ventured into the store, an unauthorized area, thereby exposing himself to harm.

After hearing two witnesses, one for the Appellant, and the Respondent himself, and following a visit to the scene of the accident, the lower court found for the Respondent, awarding him Kshs.100,000/= general damages, and Kshs.2,000/= special damages. This is an appeal against that decision, both on liability and quantum, based on the following six grounds of appeal:

1. The learned trial Magistrate erred in law and fact in holding the appellant liable without addressing the issue of liability in the judgment. 2. The learned trial Magistrate erred in law in finding the appellant liable to the respondent, without any finding as to the ground for the liability.

3. The learned trial Magistrate erred in law in failing to consider the defence and the submission on liability and quantum.

4. The decision of the learned trial Magistrate was against the weight of the evidence. 5. The decision of the learned trial Magistrate was erroneous in failing to find the culpability of the respondent in causing the accident.

6. The award of general damages was unreasonably excessive.

Ms Kimani, Counsel for the Appellant, argued before this Court that the injuries suffered by the Respondent were self inflicted because first the Respondent was not authorized to be in the area housing the machine, and second he had no authority to touch or operate the machine. She submitted that the lower court did not assign any reasons for finding the Appellant negligent, that indeed there was no finding made by the Court on liability. With regard to quantum, Counsel submitted, without providing any authorities, that the award for general damages was excessive.

Citing the case of *Shimo Limited vs Thomas I. Abwanga (HCCA 34 of 2000, Nakuru)* Mr Gitau, Counsel for the Respondent, submitted that an appellate court ought not interfere with the lower court's findings of fact except in special circumstances. Here, he said, the Court had actually visited the scene to satisfy itself about the manner in which the accident happened. With regard to quantum, Mr Gitau submitted that the Respondent's loss of middle finger, resulting in diminished function of the right arm, was permanent, and accordingly, the general damages award was fair.

As this is a first appeal, it is my duty to assess and re evaluate the evidence before the lower court, bearing in mind that this court has neither seen or heard the witnesses and should, therefore, make allowance for the same. I must be sure that the findings of facts made by the learned magistrate are based properly on the evidence before him and that he has not acted on wrong principles in reaching his conclusion. Now, having warned myself of that, let me examine the relevant evidence before the lower court. There were two witnesses who testified before the lower court – the Respondent and a supervisor on behalf of the Appellant.

In his testimony before the Court, the Respondent stated that he entered the store which housed the machine as part of his patrol duties as a watchman. He found the machine running, and saw a sack covering the machine. He wanted to check what was covered by that sack, and attempted to uncover the same when he got pulled, and fell down. The Supervisor, giving evidence on behalf of the Appellant, did not dispute that the watchman was required to patrol the premises. He did not say that the watchman knew or was instructed not to enter that particular store. He did not say that there was a warning sign indicating that no one was to enter that area, or a notice prohibiting anyone anywhere within its proximity.

Here is a case of a watchman, acting reasonably within the scope of his duties as a watchman, is on patrol within the premises, observes what he believes is unusual – a sack covering something, instinctively uncovers it, and gets injured. If this area and the machine in it was a dangerous area, should he not have been warned about it? There is no such evidence, and no evidence that his job was not to “patrol” but to simply sit and watch. The facts giving rise to this accident certainly point to the Appellant's negligence.

Here, the learned Magistrate took the additional step of visiting the premises to observe for himself the layout of the premises, and came to the conclusion that the Appellant was liable for this accident. Although the Judgment does not specifically state that the Appellant was found to have been negligent and therefore liable, this is sufficiently implied, and the evidence, in my view, on a balance of probability points to the negligence of the Appellant. I am satisfied that the lower court arrived at the right conclusion in holding the Appellant liable for this accident.

With regard to quantum, the Appellant's Counsel submitted that the award was excessive, but did not guide the court on what she believed would be the appropriate award, nor did she provide any authorities to demonstrate why the award was manifestly high.

The Court of Appeal in the case of *Butler vs Butler C A No 49 of 1983* laid down the following principles that an appellate court should consider in reversing an award of damages by the lower court.

“(a) That the court acted on wrong principles;

(b) That the court has awarded so excessive or so little damages that no reasonable court would;

(c) That the court has taken into consideration matters he ought not to have considered, or not taken into consideration matters he ought to have considered, and in the result, arrived at a wrong decision.”

Taking those principles into account, and based on the evidence in the lower court, I believe the award for general damages is fair. Accordingly, and for reasons outlined, I dismiss this appeal with costs to the Respondent.

Dated and delivered at Nairobi this 24th day of May, 2005.

ALNASHIR VISRAM

JUDGE