



**ELDORET STEEL MILLS LIMITED ..... APPELLANT**

**-VERSUS-**

**GILBERT NGANYI NEHEMIAH ..... RESPONDENT**

**JUDGEMENT**

This is an appeal from the judgement of A. Gathogo Resident Magistrate Eldoret delivered on 26th March 2003 in Eldoret SPMCC.No.773 of 2002. After a full hearing the learned magistrate in her judgement found the appellant (who was the defendant in the lower court) 100% liable in negligence for the accident and awarded the respondent (who was the plaintiff in the lower court) general damages of Kshs.200,000/=; special damages of Kshs.2,000/= with costs and interest. The appellant, having been aggrieved by the decision of the learned magistrate, has appealed to this court against both liability and quantum of damages on six grounds as follows: -

- i) That the learned trial magistrate erred in law and in fact in holding the defendant negligent in the absence of evidence to that effect.
- ii) That the learned trial magistrate erred in law and in fact in ignoring the evidence of the defendant's witnesses.
- iii) That the learned trial magistrate erred in law and in fact in ignoring the submissions of the defence without proper reason to do so.
- iv) That the learned trial magistrate erred in law and in fact in awarding damages which were excessive in the circumstances.
- v) That the learned trial magistrate erred in law and in fact in shifting the burden of proof to the defendant contrary to law.
- vi) Without prejudice to the foregoing and any admission on liability, the damages awarded were inordinately excessive in the circumstances.

This appeal arises from a suit filed by way of a plaint in the magistrate's court by the respondent against the appellant. The respondent claimed that he was an employee of the appellant and that he was injured on duty on the 18th of July 2002. He alleged that the appellant failed to honour his legal duty to take reasonable precautions for the safety of the respondent, while the respondent was engaged upon employment, not to expose the respondent to a risk of damage or injury, which he knew or ought to have known and provide a safe and proper system of working and effective supervision of the same. He listed particulars of negligence of the appellant. He also listed the particulars of injuries that he suffered, as well as particulars of special damages. The appellant company filed a defence denying that the respondent was its employee and also denied that it was in breach of any terms of employment. In the alternative, the appellant denied the particulars of negligence and breach of contract, if the accident did occur on 18th July 2002 as alleged. The appellant also averred that the respondent contributed to the accident and gave particulars of negligence of the respondent. The respondent filed a reply to the defence.

At the hearing of the case before the learned magistrate, the respondent testified and did not call any other witness. The appellant called only one witness on the defence side. In summary, the evidence of the respondent was that he works for Eldoret Steel Mills (the appellant) as a mould setter. That on 18th July 2002 he was on duty in the furnace for boiling scrap metal. In his work he used to direct those who lift and lower and pour hot metal. The appellant used to import material from India to make slives for protection against fire. Slives are cut into pieces and used to protect hot metal from spilling on to the workers. However, on that day they were told by the manager to use ordinary soil as the ladolite soil from India was exhausted. He was not provided with gloves or safety shoes. As he was working, the slives cut due to the fire and released hot metal which fell on him. He got burnt on the head, ears, left hand, groin, both legs and the whole of the left wrist. He was taken to Moi Teaching and Referral Hospital by the director of the appellant, treated and discharged. He continued with treatment and later went to get a medical report from Dr. Aluda and he paid Kshs.2,000/=. He was still not well and feels pain while walking. He cannot sit where temperatures are high. If the right materials for fire protection were bought by the appellant, he would not have been injured. His work environment was dangerous and he had no protective clothing. He blamed the appellant company for the accident and the injuries that he suffered.

The appellant called one witness by the name Elijah Wajovu who testified that he works in the Arc-Furnace department. He knew the respondent who used to work with him in the same department. He testified that he was in-charge of production operations while the respondent was a supervisor in-charge of the plate section. He stated that the respondent did not direct the plate funnel to the hole and that is how the hot metal poured on him. That the respondent was injured slightly. The respondent had worked for about 7 to 8 years and he was working alone on that day. The respondent was trained and had protective clothing and boots, but on that day he wore his own shoes. The respondent is therefore to blame for not wearing protective boots.

At the hearing of the appeal Mr. Kisia for the appellant argued grounds 1, 2 and 3 together and ground 4 and 5 separately. He appeared to abandon ground 6 of the appeal. Ground 6 is actually a repetition of ground 4. He submitted that the learned magistrate erred in holding the appellant 100% negligent in the absence of evidence. He submitted that in cross-examination the respondent stated that he did not take any precautions for his own safety. Also the respondent stated that he knew that the place he was working was dangerous. He further submitted that the learned magistrate ignored the evidence of the defence witness. The defence witness clearly stated that the respondent was provided with protective boots and hand gloves. He did not wear them and was therefore to blame for the accident. That evidence of the defence was not controverted in cross-examination. On ground 4 of the appeal he submitted that the award of damages was excessive. He submitted that the injuries were described in exhibit 1 (report of Dr. Z. Gaya). There was a distinction between severe injuries and soft tissue injuries. Also the magistrate disregarded the authorities cited by the defendant.

On ground 5 of the appeal he submitted that the respondent should have proved his case. The magistrate shifted the burden of proof to the appellant, which was wrong. Mr. Kitiwa for the respondent opposed the appeal. He submitted that the respondent was on duty when he was injured. On the day of the accident the materials for providing a safe system of work were not provided by the appellant. Workers were instructed to use alternative local sand and big slives. It was in the course of the use of improvised material that molten iron poured and injured the respondent. The respondent was not provided with protective clothing. Otherwise he would not have sustained the injuries. The only witness for the defence merely alleged that the respondent was provided with protective clothing without giving details. That witness also did not witness the occurrence of the accident, so he cannot say how the accident occurred. He submitted that the magistrate's finding that the appellant was 100% liable in negligence was correct. On quantum of damages he submitted that the injuries are shown in the reports of Dr. Gaya and Dr. Aluda (exhibit 1 and exhibit 2). The injuries were severe burns. Scars were left after healing. Therefore an award of general damages of Kshs.200,000/= is not excessive, taking into account the case authorities cited before the magistrate. This being a first appeal, I have to evaluate the evidence on record to satisfy myself as to whether there was any failure of justice. Counsel for both parties made written submissions to the learned magistrate before she gave her judgement. The appellant has appealed to this court on six grounds which are basically on liability and quantum of damages. From the evidence on record, it is the story of the respondent (who was the plaintiff and who was PW1) as against the defence evidence of DW1. Both

of them agreed that the respondent was on duty and that he was injured on duty. The only difference is that the respondent testified that he was not provided with protective clothing and that he was asked to use local material of soil on that day and that is how he got injured by the hot metal when it poured out. DW1 on the other had stated that the accident was caused by the fact that the respondent who was experienced in his work, did not direct the funnel properly on the hole and that is why the hot metal poured out. Also the respondent went to work without the protective clothing which he was provided with, that is why he suffered the injuries. The learned magistrate had to believe one or the other of those two versions. She believed the evidence of the respondent. The appellant argues that the magistrate should not have believed the version of the respondent, that she shifted the burden of proof to the appellant and that in any event the damages she awarded to the respondent were excessive.

On the issue as to whether the learned magistrate erred in holding the appellant negligent in the absence of the evidence to that effect, I have perused the record of evidence and the judgement of the learned magistrate.. In the judgement, the learned magistrate observed as follows:

“It is DW1’s evidence that the plaintiff did not direct the channel properly which led to the molten metal spilling out. On examination DW1 stated that he came to learn of the wrong arrangement only after the accident. These two facts are contradictory. If DW1 saw the arrangement after the accident then he is not in a position to say that plaintiff was negligent by misdirecting the channel.” The magistrate went further to state as follows:

“I thus find that there is no doubt that the plaintiff’s injury was evidently of the defendant’s failure to take reasonable care for the safety of the plaintiff in the circumstances as not to expose him to unnecessary risk at the time of his work in the factory. I find that the plaintiff did not contribute to the accident as alleged by the defence.” The duty of an employer in cases of negligence have been explained in the case of Mghosi –vs- Gaya Engineering Works [1981] KLR 164. In that case, Kneller .J. (as he then was), held that it is not enough for an employer to provide a safe system of work. He has also to ensure that that system of work is followed. From the evidence on record, I am of the view that the magistrate was justified in finding that the appellant was negligent. The respondent explained how the accident took place. That the right material for preventing the fire from spilling was not provided. That they were told to use improvised local material. That he was not given protective clothing and that the work place was dangerous. The only witness who testified at the trial for the appellant was not present when the accident took place, though he blamed the respondent for the accident. He stated that the respondent was provided with protective clothing. He stated that the protective material for the fire was there. However, there is no evidence of the instructions given to employees, which the respondent did not follow. There is no evidence that employees were reminded on safety at work. He only stated that a warning letter was given to the respondent, which letter was not produced in evidence. Even if such a letter was there, in my view it would not help the appellant as it was after the event. In those circumstances, I agree with the learned magistrate that the appellant as an employer was negligent to the tune of 100% for the accident to the respondent. My humble view is that the appellant neither provided a safe system of work for the respondent, nor did he ensure that such safe system of work was followed. I also find no basis for the complaint that the learned magistrate ignored the evidence of the defence witness. The above analysis by the learned magistrate on the evidence of the defence witness clearly shows that the learned magistrate considered the evidence of the defence before coming to her own conclusions on who is to blame for the accident. This disposes of ground 1 and 2 of the appeal.

On the complaint that the magistrate ignored the submissions of the defence, the learned magistrate did observe as follows –

“I have perused the defendant’s authority. I find that the authorities are on scars due to accidents and not burns as in the instant case. I do not find them relevant.”

In the above circumstances, I am of the view that the learned magistrate did consider the submissions of the counsel for the appellant and the case authorities cited in her judgement. She only found the case authorities cited not to be applicable, as they were based on minor injuries, when compared to the injuries suffered by the respondent. Therefore that ground of appeal must also fail.

I now turn to the ground that the learned magistrate shifted the burden of proof to the appellant. I have perused the judgement. The learned magistrate observed as follows – “If DW1 saw the arrangement after the accident then he is not in a position to say that the plaintiff was negligent by misdirecting of the channel. No evidence was led by DW1 to prove that the slaves complained of by the plaintiff were in good working conditions on that day. The DW1 as the supervisor of the plaintiff failed to avail before the court the warning letter he issued to the plaintiff whom he blamed for proceeding with work at the channel before his express authority hence leading to the injuries sustained by the plaintiff.” It is trite law that every party who alleges the existence of a fact has the burden of proving the same. This is the import of section 109 and 112 of the Evidence Act (Cap.80). As was held in the case of Anne Wambui Ndiritu – vs- Joseph Kiprono Ropkoi & Another, Nyeri CA. No.345 of 2000 (unreported), the above two sections of the Evidence Act carry the often repeated evidential adage “he who asserts must prove.” The allegation that the respondent misdirected the pouring of hot metal into the channel, that the slaves were in good working condition, and that the respondent was given a warning letter, were made by DW1. Therefore, it was for him to establish those facts on the balance of probabilities. This he did not do before the learned magistrate. I therefore find no shifting of the burden of proof by the learned magistrate in those circumstances. The learned magistrate was merely analyzing the evidence in order to come to her own conclusions, which she was entitled to do. That did not amount to shifting of the burden of proof to the appellant.

On quantum of damages, an appellate court will usually be slow in interfering with the quantum of damages awarded by a trial court, unless it is satisfied that the trial court took into account an irrelevant factor or failed to take into account some relevant factor in arriving at the said quantum of damages, or that the damages are inordinately low or high. (Stanely Maore –vs- Geoffrey Mwenda, Nyeri CA.No.147 of 2002 – Unreported). I have perused the judgement and authorities cited before the magistrate. I do not find any irrelevant factor that the magistrate took into account nor that she failed to take into account any relevant factor. The respondent suffered severe injuries as found by the magistrate. Though those injuries were soft tissue injuries, they would leave permanent scars. Soft tissue injuries refer to the injuries to the flesh as opposed to bones. Soft tissue injuries can be severe and in cases of burns will result in severe pain and can even lead to death. I see no contradiction between the report of Dr. Gaya and that of Dr. Aluda. Dr. Aluda describes the injuries as severe. The fact that Dr. Gaya describes the injuries as multiple soft tissue injuries does not make them less severe. Dr. Gaya was the doctor for the appellant. His report describes the injuries as a healed scar 17cm x 13cm on the left forearm; healed scar 3cm x 2cm on the left hip; healed scar 20cm x 23 cm on the right foot; healed scar 36cm x 26cm on the left ankle and foot with hypopigmentation on the dorsum. The learned magistrate found those injuries to be severe. I concur that they were severe injuries. The learned magistrate considered the case authorities cited to her on the injuries suffered before making the award. I do not think that the award of KShs.200,000/= for general damages is excessive, for the type of injuries suffered. In the result, therefore, I dismiss this appeal and uphold the decision of the learned magistrate. I award costs of the appeal to the respondent.

**Dated and Delivered at Eldoret this 3rd Day of May 2005**

**George Dulu**

**Ag. Judge**

**In the Presence of:**