



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI

Civil Appeal 742 of 2003

**SOCFINAF COMPANY LIMITED.....APPELLANT**

**VERSUS**

**JOSHUA NGUGI MWAURA.....RESPONDENT**

(An Appeal from the Judgment of Hon. Shem Kebongo, RM  
in Gatundu RMCC No. 762 of 2002 delivered on 30th September, 2003).

**JUDGMENT**

On 19th October, 2002, the Respondent (Plaintiff in the lower court), then a casual labourer employed by the Appellant, suffered injury as he fell down carrying heavy water pipes, in the course of his employment. He filed a suit in the lower court alleging negligence on the part of his employer. The lower court found for him and awarded him Kshs.70,000/= in general damages, and Kshs.6,500/= in special damages.

It is against that Judgment that this appeal has been preferred. The following are the grounds of appeal:

- 1. The learned Magistrate erred in law and in fact in finding on liability at 100% against the Appellant when none was established in evidence at the hearing.***
- 2. The learned Magistrate erred in law and in fact in failing to appreciate or take into consideration the Appellants submissions or at all.***
- 3. The learned Magistrate erred in law and in fact in reaching a finding on negligence when the evidence adduced before him did not support the Pleadings nor did the same establish the occurrence of an injury on 19th October, 2002 as alleged.***
- 4. The learned trial Magistrate erred in law and in fact by misdirecting himself leading to a finding on liability when the evidence adduced did not support such a finding and thereupon assessing damages erroneously without any evidence on liability having been established.***
- 5. The learned Magistrate erred in law and in fact in failing to appreciate the laid down principles of law that parties are bound by their pleadings but allowed evidence contrary to pleadings to be led before him thereby reaching a wrong finding on both quantum and liability.***
- 6. The learned Magistrate erred in law and in fact in failing to appreciate the totality of evidence adduced before him which clearly demonstrated that no accident as alleged occurred or at all.***

Both liability and quantum are in issue in this case. In his submissions before this Court, Mr Waweru, Counsel for the Appellant, argued that there was no evidence of any injury to the Respondent on 19th

October, 2002 as pleaded in his Pleint; that the Respondent could not have been injured on 19th October, 2002 as he continued to work and reported to the clinic only on 26th October, 2002; and finally that the award of Kshs.70,000/= was manifestly excessive considering the minor nature of the injuries sustained by the Respondent.

Mr Ngare, Counsel for the Respondent, argued that there was no inconsistency between the pleading and the evidence adduced in that although injury took place on 19th October, 2002, the Respondent chose not to seek medical help until the 26th October, 2002; and noting that the Appellant had made no submissions in the lower court on the issue of quantum, he submitted that the award of Kshs.70,000/= was fair. Although the Judgment of the lower court is very brief (slightly over one page) and is not adequately reasoned, there is a clear finding of negligence and liability.

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.

In his evidence before the Court, the Respondent testified that he got injured on 19th October, 2002 when he slid as he attempted to move three heavy metal pipes from one side of the premises to another. That area was muddy. He had not been provided with gumboots. The pipes were heavy – he should not have been carrying more than one at a time, but had been instructed to carry three at a time. As a result he slid, and fell, injuring his right hand.

The Respondent's evidence is corroborated by DW 2 – Dennis Musiemi Ndegwa, who was the Appellant's supervisor at the material time. He testified that the Respondent did indeed report his injury to him on 19th October, 2002 and despite being told to go to the clinic the Respondent continued work. The Appellant's third witness, Catherine Wanjiku Njoroge, DW 3, a nurse with the Appellant, said that the Respondent reported to her clinic on 26th October, 2005, and not on 19th October, 2005. It is this variation in dates that led the Appellant's Counsel to argue that the Respondent had not proved his case "as pleaded". The Pleint discloses the date of the injury as 19th October, 2005.

I do not accept the argument advanced by the Appellant that there is a variation between what was pleaded, and the evidence produced before the lower court. I see no inconsistency. The injury took place on 19th October, 2002 as pleaded in paragraph 4 of the Pleint. That was his uncontroverted evidence in the lower court, corroborated, as I said before, by DW 2 – Dennis Ndegwa. The fact that he went to the clinic seven days late on 26th October, 2002 did not alter the fact that the injury took place on 19th. It was his choice whether to go to the clinic right away or later. Clearly the nature of his injury, and the degree of pain, would have dictated his choice. One can only presume that he felt he was able to continue working despite the injury. I would, therefore, conclude, as did the lower court, that the injury took place on 19th October, 2002 as pleaded; that it happened in the course of his employment. I also find, based on evidence in the lower court, that the Appellant's failure to provide the Respondent with protective gear such as the gumboots while carrying a heavy load in muddy space, and its supervisor's insistence that he carry three heavy pipes at a time, instead of one, constituted acts of negligence on the part of the Appellant, for which the Appellant is fully liable.

With regard to quantum, I must agree with the Appellant's Counsel that the award of Kshs.70,000/= for general damages is excessive given the minor injuries suffered here. I am mindful of the following principles laid down by the Court of Appeal in ***Butler vs Butler (C A 49 of 1983)*** in guiding the Appellate Court whether or not to reverse 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.”

I believe this is a proper case where I should interfere with the award, which I believe is manifestly, and grossly excessive. This is a case of “blunt injury to the right forearm” according to the medical evidence produced. There was no fracture, no hospitalization, and no permanent disability. All the cases cited to and relied by the lower court in making its award were cases denoting much severe and multiple injuries. Here, it is only the right forearm that was injured, and subsequently, fully healed. I find the case of **Loise Nyambeki Oyugi vs Omar Haji Hassan (Nairobi HCCC NO 4150 of 1991)** much more relevant, where Ang’awa, J awarded Kshs.20,000/= for soft tissue injuries for pain and suffering. Following that case, I believe the appropriate award for general damages in this case ought to be Kshs.20,000/=. I will not interfere with the award of Kshs.6,500/= for special damages as the same has not been challenged either in the grounds of appeal or in submissions before this court, although that amount was not specifically pleaded in the Plaint.

Accordingly, and for reasons outlined, this appeal is partly allowed; the Judgment and decree of the lower court is set aside; and in its place I enter Judgment in favour of the Respondent for Kshs.20,000/= as general damages, and Kshs.6,500/= as special damages plus costs (in the lower court) and interest at court rates.

The parties shall bear their own costs of this appeal.

Dated and delivered at Nairobi this 13th day of June, 2005.

**ALNASHIR VISRAM**

**JUDGE**