REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

Civil Appeal 42 of 2000

(Being an appeal from the Judgment delivered on 13/3/2000 by Ms. Mary Kiptoo, the Resident Magistrate in Eldoret Senior Principal Magistrate's Court Civil Case No. 971 of 1998)

ELGEYO SAW MILLS …… APPELLANT

VERSUS

ATANAS MULUP BURUTI ……..…… RESPONDENT

JUDGMENT

This appeal emanates from the decision of the Resident Magistrate, Eldoret, in which she found entered judgment in favour of **ATANAS MULUP BURUTI,** who had sued his employer **ELGEYO SAW MILLS.**

Buruti filed his suit against his employer Elgeyo Saw Mills on 3/7/1998. He prayed for judgment against it, and for both general and special damages, as well as costs.

After a full trial, the learned trial Magistrate found that Elgeyo Saw Mills had failed to provide Atanas Mulupi Buruti with protective clothing; that it was therefore negligent and it was thus liable for his injuries to the extent of 80%, and therefore entered judgment in his favour, and proceeded to award him Kshs. 70,000/- for special damages less the said contribution of 20%, Kshs. 1,500/- for general damages as well as costs and interest.

Elgeyo Saw Mills, who feels aggrieved by the said decision, has preferred this appeal which is based on the grounds that:

> ***"1. THAT 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 that regard. 2. THAT the learned trial Magistrate erred in law and in fact in failing to hold the Respondent negligent notwithstanding the availability of evidence in that regard.***
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> ***3. THAT the learned trial Magistrate erred in law and fact in awarding damages which were inordinately high and/or excessive in the circumstances as to amount to an erroneous estimate of the loss suffered by the Respondent.***
>
> ***4. THAT the learned trial Magistrate erred in law and fact in using wrong principals in the assessment of damages.***
>
> ***5. THAT the learned trial Magistrate erred in law in failing to subject the special and general***

damages awarded to a substantial degree of contribution"

I shall now refer to Elgeyo Saw Mills as "the Appellant".

Buruti, who I shall now refer to as the "the respondent", had based his claim on his contract of employment, as chemicals which he was mixing at the material time splashed on his face as a result of which he sustained serious injuries, yet it was incumbent upon the appellant *"to take all reasonable measures to ensure"* that he was *"safe while engaged upon his work"* and not to expose him to a risk. He therefore pleaded that his employer had been negligent.

The appellant who denied the claims averred that the respondent had acted negligently and that he was wholly to blame for his injuries, and though the particulars of the said negligence were specified in the defence, there was no reply to that defence. I shall however come back to it at a later stage.

The respondent's evidence was that while working as a glue mixer, on 3/3/1997, the glue which was then mixing splashed on his face and right eye; that he washed it away after which he was attended to at the respondent's dispensary where he was given drugs. He attributed the blame to the company, as he had not been provided with protective goggles.

PW2 who examined him a year after the accident corroborated the evidence to the extent that the respondent had informed him that he sustained chemical burns in the face and that the right was swollen and tender, and which had poor visibility. He described the injuries as very severe.

The appellant called 2 witnesses. These were DW1, who was then an operator in the commercial section, who confirmed that the respondent had informed him that chemical which he had been stirring had splashed into his eyes; that he gave him permission to go for treatment. It was also his evidence that the respondent had in his possession protective gloves, goggles and a mask which were provided by the supervisor, and which he should have worn as he mixed the glue. He could however not confirm whether the glue had actually splashed into the respondent's eye except for the fact that his eye was in tears at that time when he reported the incident that morning; that he appeared normal on the following day.

DW2, a registered nurse and midwife who worked in the appellant's clinic then, confirmed having prescribed drugs for the respondent after he had gone to the dispensary complaining about stomachache and a swollen right eye, but denied that he had informed her that glue had splashed into his right eye. She was of the opinion that if glue had entered into his eye, it would have been swollen.

I have also looked at the respondent's exhibits 1 & 2, and I do note that while exhibit P1 confirms that he had been attended to at the clinic on the material date, where he was diagnosed with conjunctivitis, and was treated with antibiotics and pain killers, the latter confirmed that he had pigmentation on his face, tenderness on the right eye, whose vision was blurred.

The appellant however produced exhibit D1, in which the doctor controverted all the medical issues raised in the respondent's exhibits. The report shows that the respondent had informed him that he had been affected since 1990, and that he felt affected as he worked as a glue mixer. After examining him in September 1998, he noted that the conjunctiva showed slight allergic conjunctivitis. It was his opinion that his medical examination did not reveal any functional or organic disability on his body and that he had no disability due to his work.

Coupled with the above mentioned pleadings and line of evidence, it was incumbent upon the learned trial Magistrate to review the same with a view to establishing whether the respondent had proved his case on a balance of probability.

As is expected of me, I have had to re-evaluate the evidence on record. Upon examining all the exhibits, I find that respondent's exhibits are more credible as it shows that he actually sustained the injuries at the material time, for which he was treated at the dispensary. I do therefore find that the respondent was able to show that he had sustained injuries to his right eye as he carried out his duties as a glue mixer at the

appellant’s premises.

But the appellant had raised a defence of contributory negligence. It was its evidence that the respondent proceeded with his glue mixing activity on the material day without wearing his protective gear, yet he was entitled to collect his gloves, goggles and mask from the supervisor. I find that having failed to use his protective gear he could not be heard to claim that the appellant had failed to take all reasonable measures to ensure that he was safe while engaged on his duties. In my humble opinion, he exposed himself to the risk while knowing very well of the consequences of not using his protective gear, and in the circumstances he could not attribute the blame to the appellant, and on that account, this appeal is bound to succeed.

But I could be wrong in the above finding.

Parties are bound by their pleadings. It is also trite law that a plaintiff who does not traverse the particulars of negligence as alleged by a defendant, admits the negligence as alleged in the defence. As stated earlier, though the appellant had attributed blame to the respondent, who it claimed was negligent, there was no reply to the defence. In the circumstances the learned trial erred by finding that the respondent had proved his case on a balance of probability, for he had not.

The upshot of all this is that I do allow the appeal, set aside the judgment, and I do dismiss the respondent’s suit. Each party shall bear its own costs of the suit and this appeal. Dated and delivered at Eldoret this 6th day of July 2005.

JEANNE GACHECHE

Judge

Delivered in the presence of:

Mr. Karira for the respondent

No appearance for the appell**ant**