REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL APPEAL NO 658 OF 2002

DEVKI STEEL MILLS LIMITED …….…… APPELLANT

VERSUS

JOSEPH MUTUA MULWA …….…… RESPONDENT

JUDGMENT

On 14th December, 2000 the Respondent/Plaintiff then a crane helper in the employment of the Appellant/Defendant suffered an electric shock in the course of his duties while injecting fuel onto the crane, causing him personal injuries.

From the evidence given in the lower court, the Respondent/Plaintiff was offloading billets from the crane when the driver (who was the 2nd Defendant in the lower court) asked him to pump fuel into the crane; when the crane was about 10 metres high it touched an electric wire that electrocuted him.The Respondent/Plaintiff suffered personal injuries on the head, right hand, thumb, elbow, right foot and burns on the stomach.The driver, on the other hand, was not electrocuted and suffered no injuries because he was wearing protective gloves.

The Respondent/Plaintiff filed a suit in the lower court against the Appellant Company and its employee, the driver, for personal injuries he sustained.The lower court found the Appellant 85% liable and the Respondent 15% liable. Hence this appeal, based on the following grounds:

1. The learned magistrate erred in hold ing the Defendant liable

2. The learned magistrate erred in holding that the Plaintiff had proved his case on a balance of probability

3. The learned magistrate erred in holding the Defendant liable when the Plaintiff and/or the evidence on record clearly stated/showed otherwise

4. The learned magistrate erred in holding the defendant liable without any negligence having been proved on the part of the defendant

5. The learned magistrate erred in finding the defend ant in breach of its duty of car e towards the Plaintiff

6. The learned magistrate erred in holding the defendant wholly liable or liable at all for the Plaintiff's injuries

7. The learned magistrate erred in not dismissing the Plaintiff 's claim on grounds of his failure to prove negligence on the part of the Defendan t

8. The learned magistrate erred in awarding general damages of Kshs.250,000/= which are excessive and unjustified.

Miss Nagi, Counsel for the Appellant, chose to argue grounds 1, 2, 4, 5, 6 and 7 together. She submitted that the Appellant was not in breach of any duty of care to the Respondent and that it was the Respondent who brought upon himself the injuries through his own negligence. She argued that evidence in the lower court showed that the Respondent was provided with protective gloves, and was trained in safety precautions, and instructed to wear the gloves but chose not to wear the same on the material day.Evidence also showed that the driver (2nd Defendant in the lower court) was not injured in the course of the same accident because he had worn protective gloves. She relied on the case of **Haymes vs Qualcast (wolver hampton) Ltd C A 1 WLR 1958) i**n which the Plaintiff was held 75% liable for not wearing protective gear that he had been provided with by the employer.

In his submissions, Mr Muindi, Counsel for the Respondent, noted that this appeal had been preferred only by the 1st Defendant in the lower court, that is the employer, and, therefore, the 2nd Defendant, the driver, is deemed to have accepted his negligence.

This appeal has indeed been preferred by the employer, the 1st Defendant, to challenge its liability, if any, to the Plaintiff, and the issue before this Court is whether the Appellant employer was liable in negligence to the Respondent employee, and if so, the extent of that liability, and finally the damages payable.

Having read the Record of Proceedings, I agree that the Magistrate was correct in her conclusion that "both sides must share liability" but incorrect on the proportion of the contribution. This is because she correctly found that if the Respondent had worn protective gloves that had been provided to him, he would have suffered no injury – just as the 2nd Defendant suffered no injury because of the gloves. Obviously, then, he was to blame significantly for this unfortunate accident. The employer did what it best could in providing protective equipment, and in training its employees on safety precautions.

Counsel for the Respondent argued that the Respondent was employed as a turn boy and trained on his duties regarding the same. The company gave him gloves but had not trained him on how to use the same or on safety.The ***Haynes case*** could not, therefore, apply, he argued.

This Court, being the first appellate court, has carefully considered the evidence adduced in the lower court to ensure that the finding of facts by the trial court are based properly on the evidence before it and that it has not acted on wrong principles in reaching its conclusion ***(See Makube vs Nyamuro (1983) KLR 403 .***

Now, let us see how the lower court delivered itself on the findings of facts:

> "I carefully weighed both sides of the matter and find that liability must be shared because whereas the defendants crane driver was certainly careless in having the crane come into contact with live electric wires the Plaintiff had also neglected to wear protective gloves issued by the company as he himself has admitted. His co worker the crane driver (2nd defendant) for example was not injured though sitted inside the crane because he had complied rules and had worn his protective gloves. I assess the Plaintiffs contribution to his own injury at 15%. The defendant will bear the remaining 85% liability."

Winfield and Jolowicz on Tort by **W V H Rogers**, 14 Edition, London Sweet and Maxwell at page 213 states inter alia:-

> ***"If a worker is injured just because no one has taken the trouble to provide him with an obviously necessary safety devise, it is sufficient and in general satisfac tory to say that the employer has not fulfilled its duty."***

Further, pages 215 – 216 states inter alia that:

> ***"the employer must take reasonable care to provide his workers with the necessary plant and equipment and is therefore liable if any accident is caused through the absence of some item of equipment …"***

The evidence before the lower court was clear: that both parties were to blame equally for this accident; the employer for allowing the same to come into contact with live electric wires; and the employee for not wearing protective gear, which he freely admitted he was given, but simply did not bother to put it on. In the circumstances, he must take an equal blame for causing this accident. The employer is expected to take all reasonable steps to ensure the employee's safety. He is not expected to watch over the employee constantly. (See ***Woods vs Durable Suites Ltd (1953) 2 AU ER 391.***

Accordingly, I hereby set aside the Judgment of the lower court on liability and substitute the same with the finding that both the parties are liable equally.

On the issue of Quantum, Counsel for the Respondent argued that the trial magistrate's award of Kshs.250,000/= was excessive and unjustified considering the injuries sustained. She relied on the following cases: ***Simon Azeze Muhandia vs Hon . Attorney General Nairobi HCC C 3041 of 1987*** in which the court awarded Kshs.140,000/= as general damages for pain, suffering and loss of amenities for extensive degloring and grafting of the skin loss of the leg together with correction of a flexion contracture of the knee.

Lilian Otieno vs Jos eph Kimani Nairobi HCC 2670 of 1986 the court awarded the Plaintiff who suffered extensive burns on both legs and where total disability was assessed at 35% general damages for pain, suffering and loss of amenities at Kshs.150,000/=.

Japheth Lusuli Luhomb o vs D T Dobie Company Limited & Another Nairobi HCC 2316 of 1982 in which the Plaintiff suffered burns over his right shoulder, right wrist area was awarded Kshs.100,000/= as general damages for pain and suffering and loss of amenities.

The Respondent in this case was electrocuted and suffered from burns on the sole of the right foot, anterior abdominal wall and the left wrist, bruises on the right cheek and the right wrist. He was admitted in hospital for 3 days and discharged. This is according to the medical evidence submitted in the lower court as P Exhibit 2. These injuries were much severe than those cited in the above cases. Based on these injuries, I am satisfied that the award of Kshs.250,000/= was manifestly excessive and unjustified.

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 to 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 an award of Kshs.150,000/= for general damages is fair.

Accordingly, and for reasons outlined, I set aside the Judgment of the lower court and substitute the same with an award of Kshs.150,000/= for general damages; the Respondent will bear 50% of that as contributory negligence; the lower court's award of Kshs.1,500/= for special damages will remain undisturbed.

Each party shall bear its own costs.

Dated and delivered at Nairobi this 19th day of October, 2004.

ALNASHIR VISRAM

JUDGE