**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 194 OF 1999**

**N.G. COUROS t/a DOUROS DRILLERS LTD ……. APPELLANT**

**VERSUS**

**JOSHUA MAITHA MBOLE …… RESPONDENT**

**JUDGMENT**

On 13th August 1998 the respondent Joshua Maitha Mbole filed a suit in the court of the Senior Resident Magistrate Kangundo to claim against the appellant general and special damages for the injuries he sustained in the course of his duties at the former's premises on 26th April 1998.

Paragraph 4 of the plaint drawn on 7th August 1998 stated that on the above mentioned date "which (while) in the defendants employment at Donyo Sabuk sustained very severe injuries and suffered loss and damage for which he holds the defendant liable for negligence".

The particulars of negligence and injuries were given in the same paragraph.

In a defence filed in court on 1st September 1998 the appellant denied the contents of paragraph 3 and 4 of the plaint and stated that when he employed the respondent, the latter had a wound on the leg.

And that in fact on the date of the incident, if at all, the respondent was not on duty.

Thus the appellant denied liability in its entirety.

When the case came up for hearing on 25th Marcy 1999 the respondent stated that he had started working for the appellant as a driller on 21st January 1998 and that while on duty on 26th January 1998 he was pierced by a maize stalk on the left ankle joint.

That, with one Thomas, the respondent was connecting a rock socket which had a chain spanner which required that they pull the chain back. That in the process of doing so, the respondent was injured. The appellant Nicholas George and his witness Stephen Musau denied that the respondent was injured at the appellants' place of work.

The learned magistrate wrote and delivered his judgment on 23rd April 1999 in which he held the appellant wholly to blame for the accident and awarded the respondent Kshs125,000/= general damages and Kshs.2,000/= as special damages plus costs of the suit and interest; hence the appeal dated 21st and

filed in this court on 25th May 1999.

Grounds 1 and 2 of the appeal dealt with the issue of liability against the appellant.

These grounds were that no evidence was adduced by the respondent to found negligence or want of duty of care on the part of the appellant.

In paragraph 4 of he plaint where particulars of negligence were mentioned, this is what is stated:

**"PARTICULARS OF THE DEFENDANT'S NEGLIGENCE** - Failing to provide the plaintiff with protective clothing; -

Failing to have regard to the safety of the plaintiff at his place of work;

- Failing to ensure safety of the plaintiff

- Causing the plaintiff to work in an environment and/or under condition that are risky to his health".

However when the plaintiff (respondent) testified, this is what he said;

> **"……I recall on 26.1.98 I was at Donyo Sabuk; I was in the employment of Douros Drillers. I started working for him on 21.1.98. We were drilling a bore hole at Nzambani. On that day I was with 3 others, Stephen, Th omas and one Mwangi. We were connecting pipes, we were particularly connecting a rock socket, this had a chain spanner which requires that we have to pull the chain back. I was pulling with one Thomas. While I was doing so I was pierced by a maize stick and started bleeding".**

The rest of the plaintiff (respondents') evidence was about his treatment.

As one can see, he advanced no evidence to show how the appellant committed breach of his duty of care or how he was negligent.

It is as if the respondent was telling the lower court

**"Here is evidence of what happened. Deduce**

**negligence and want of duty of care of the defendant from there".**

This is not good enough. The respondent was being led by counsel and he should have done abit better than this.

There was no evidence absolutely to implicate the appellant with negligence and/or want of duty of care.

In fact in the respondents' evidence and the duties he was performing, there was no explanation as to how the maize stalk would have pierced him on the left ankle joint.

The same arguments go for ground (paragraph 3) of the memorandum of appeal.

At the same time the magistrates' judgment did not give any reason for arriving at the decision to blame the appellant wholly for the accident in absence of such reason in the respondent's evidence.

In those circumstances, the decision of the learned magistrate was against the weight of evidence and the fact that the appellant had spent some money on the respondents' treatment should not have been used

as evidence against him as this was the respondent's case and it was him to adduce evidence to prove it. There was no question of justification for shifting this burden to the appellant.

Thus the issue of liability was not justifiably resolved in favour of the respondent, hence the issue of awarding damages to him in the sum of Kshs125,000/= or specials of Kshs.2,000/= plus costs could not have arisen.

I allow this appeal and set aside the lower court order with an order that each party do bear his/its own costs of this appeal and the case in the lower court.

Delivered this 9th day of April, 2003.

**D.K.S AGANYANYA**

**PRINCIPAL JUDGE**