



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**CIVIL APPEAL NUMBER 119 OF 2010**

**JOHN FRANCIS WAMBUGU.....APPELLANT**

**VERSUS**

**BHOGALS GARAGE LIMITED..... RESPONDENT**

*(An Appeal from the Judgment/Decree of Honourable C.A. Otieno Resident Magistrate, Nakuru delivered on 19th/April 2010 in Nakuru CMCC No. 1586 of 2006)*

**J U D G M E N T**

1. The Appellant was an employee of the Respondent as an assistant turner in its workshop. While performing duties assigned to him by the employer through his supervisor on the 11th November 2005, he was accidentally and sustained injuries that this doctor listed as fracture of the left index finger and soft tissue injuries on the same figure.

He sued the employer for negligence and sought special and general damages.

Upon hearing of the case, the trial Magistrate made a finding that the appellant had not proved any negligence against the employer and dismissed the case with costs.

Being dissatisfied with the said decision, this appeal was preferred. Four grounds of appeal were preferred and may be summarised that:

1. ***The trial Magistrate erred in law and fact in coming to a finding that the appellant did not establish by evidence any negligence against the respondent to the required standards.***
2. ***The trial Magistrate failed do consider the appellants evidence and to give reasons for the judgment in awarding a sum in damages that was too low in compensation for the injuries sustained.***

2. The appellant's evidence tendered before the trial court was not disputed, that he was indeed an experienced employee of the respondent of over 20 years, that he did not need supervision in the work, that he knew of the dangers of using the machine he used to operate, that he knew how far to push the spider gear of the machine. He also testified that it was himself to decide what tools to use for certain work and therefore when he was injured by the machine, it was an accident that he did not expect. He however told the court that on the material date, he was asked to use a different machine that was not made for the work assigned to him. In his own words, he stated:

***“I blame the defendant for the accident as I used a machine that was not meant for the work I was doing. My supervisor insisted on me using the machine he said the right machine was***

*being used for something else. I was not given any special tools to use. I was not given gloves.”*

3. Indeed DW1, Eliphaz Omuchimba, the respondents foreman in the Engineering Department confirmed that the appellant did not require supervision as he knew his work well and that he was not forced to use the machine that injured him.

In the particulars of negligence stated by the appellant in his plaint dated 31st July 2006, the appellant blamed the respondent for failure to provide him with proper and safe system of work, failure to provide protective devices, failure to warn him of the damages involved in the work and compelling him to use a defective machine, all of which the respondent denied in its statement of defence.

4. Upon analysis of the evidence tendered before him, the trial Magistrate made a finding that no negligence was established and proved against the respondent and dismissed the suit with costs. In arriving at the said finding, the trial court reasoned that the appellant having more than 20 years experience did not need any supervision and that it is the machine he was controlling that eventually injured him.

5. I have reevaluated and reconsidered the evidence tendered before the trial court.

It is the duty of first appellate court to analyse the said evidence and make its own findings and conclusions.

See – **Mariera vs KBS Ltd (1987) e KLR**. The trial courts findings of fact are not binding to this court and it is to make its own findings despite the fact that it neither saw nor heard the witnesses testify. It is however bound by the proceedings as recorded by the trial court. It is trite that the burden of proof of negligence against an employer lies with the employee to prove that he was injured in the course of employment.

In this case there is no dispute on that fact. The only issue for determination is whether the respondent was negligent and whether liability can attach to an employer without fault, and whether there can be an accident without fault.

6. In the case **Muthuku vs Kenya Cargo Services Ltd (1991) e KLR** in very much similar circumstances like in the present case, the appellant had worked under the system and in safety for many years until the isolated accident, happened. The appellant in his own words admitted:

*“that the injury was a merely accidental we were not being directed by supervisors on when to and how to lift the nuts. No special implements were required*

”

Given the above statement, and just like the case of the appellants evidence herein, would negligence then be attributed to the respondent? The Judges of appeal in the **Muthuku** case (above) held that despite there being no fault, the appellant had to prove, upon a balance of probability, one of the many forms of negligence as alleged in the plaint. They went ahead and held that:

*“Our law has not yet reached the state of liability without fault.”*

An accident is an unforeseen and unplanned event or circumstances. It cannot just happen. There must be some fault or negligence by one or more persons to cause or trigger the event or circumstances which leads to the accident.

In this case, though the accident was accidental, meaning it was of no ones fault, our Kenyan jurisprudence was unfortunately not developed to the level that there could be liability without fault.

7. I have stated earlier that it was not in dispute that the appellant had not been provided with any

protective devices while operating the machine, admittedly a dangerous machine. The respondent never contravened that evidence. It is therefore a finding of this court that the respondent failed to provide protective devices to the appellant. This was negligent of the employer bestowed upon him by statute which puts liability upon the employer.

In the case **Otieno Nalwoyo vs Mumias Sugar Co. Ltd (2014) e KLR** the court held that the employer is under an obligation placed upon it to provide a safe working system for its employees. This in my view includes providing the employees with protective devices especially where the work being performed is potentially dangerous like when using dangerous machines. The court made observations that:

***“that the duty of an employer to provide its servants a safe place of work is not merely to warn against unusual dangers known to them the master is under a duty to take reasonable case to avoid harm.”***

It is also upon an employer to provide safe systems for the employees even for those unforeseen dangers by providing all necessary equipment and protective devices should such danger occur.

**Section 74 of the Employer Act** too places such duty of care upon the employer. See **Bigot Flowers (K) Ltd vs David Were – Nakuru HCCA No. 190 of 2008** and **OI Njorowa Ltd vs Alfred Wafula Wekesa also Nakuru HCA No 32 of 2008**.

8. It is trite that the burden of proof of any fact or allegation is on the plaintiff. He must prove a causal link between someone's negligence and his injury. He must adduce evidence from which, on a balance of probability a connection between the two must be drawn. See **Amalgamated Saw Mills Ltd - vs Stephen Muturinguru HCCA No. 75 of 2005**.

Though the appellant stated that the injury was an accident, that accident could have been avoided and the injury minimised had he been provided with gloves, that would have minimised the injury to the fingers.

9. For the above reasons, it is this court's findings that there was sufficient evidence tendered by the appellant to prove negligence by the appellant as the employer on a balance of probabilities. The trial Magistrate therefore erred in law and fact in his findings that the appellant did not establish by negligence against the respondent.

The upshot of the above is that the appeal has merit and the same is allowed.

10. In the matter of *quantum* of damages, the trial court awarded a sum of Kshs.40,000/= in general damages for pain and suffering.

The injuries sustained by the appellate are not disputed. These are fracture of the left index finger and soft tissue injuries on the same figure.

11. The appellant submits that the sum of Kshs.40,000/= was inordinately low, and proposes enhancement to Kshs.300,000/=. He relied on the case **Samuel Kariuki Kingu vs Makenzie** where a sum of Kshs.100,000/= was awarded in 1994 for similar injuries.

The respondent proposes a sum of Kshs.50,000/= before the trial court, and reiterates that the said amount is reasonable.

An appellate court will not easily interfere with a trial court's discretion in assessment of damages unless it is shown that the said amount is inordinarily so low or high as to represent an erroneous estimate of the damages. The award by the damages. The award by the trial court of Kshs.40,000/= on the face of it is so low for the nature of the injuries sustained. Other than the soft tissue injuries, the appellant sustained a fracture of the left index finger. The trial court did not base his assessment on any comparable decisions. I find the said sum not true reflection of fair and reasonable compensation.

See **Kemfro Africa t/a Meru Express Services and Another (198299) KAR 727**. For those reasons, I shall enhance the award to Kshs.80,000/=. In arriving at the said sum, I have considered the cases **Munga Nzaka Munga vs Mawji Govind & Co HCCC No. 601 of 1987** and **Jeryssio Nderitu Muruthi vs Hanan Mbogo Wachira & Another HCCC No. 4174 of 1986** where both cases for injuries to the fingers the courts awarded Kshs.50,000/= and Kshs.60,000/= in 1989 and 1987 respectively. Though these cases are well over Eighteen (18) years old, the in difference in the money value has been considered.

I have also considered the cases **OINjorowa Ltd vs Alfred Wafula Wekesa (Supra)** and **Bigot Flowers (K) Ltd (Supra)** where the court on appeal awarded Kshs.70,000/= and Kshs.75,000/= in December 2014 and March 2016 respectively for relatively soft tissue injuries.

12. In conclusion, the appeal on both liability and *quantum* is allowed. The trial courts Judgment is set aside and is substituted with judgment in favour of the appellant against the Respondent on liability at 100% and general damages in the sum of Kshs.80,000/=.

Special damages of Kshs.2,500/= is also allowed having been proved. The costs of the appeal shall be borne by the Respondents.

**Dated, signed and delivered in open court this 14th day of July 2016.**

**JANET MULWA**

**JUDGE**