



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Appeal 182 of 2003

SOKORO SAW MILLS LTD.....APPELLANT

VERSUS

JOSEPH THUO NG'ANG'A.....RESPONDENT

JUDGMENT

The appeal herein is against the judgment and award made in favour of the respondent against the appellant in CMCC No. 192 of 2001, wherein the Hon. S. Muketi, Senior Resident Magistrate, entered judgment for the plaintiff in the sum of Kshs 33,600/= being 80% of an award of Kshs 42,000/= made in respect of general and special damages as compensation for injuries sustained by the respondent while in the employment of the appellant. The appeal raises five grounds out of which, grounds 1, 2, 3 and 5 were consolidated and argued together while ground 4 was argued separately. The said grounds were as set out in the Memorandum of Appeal are as follows:

1. *The learned trial magistrate erred by finding in favour of the respondent and against the appellant on liability when the former was never injured in the course of employment whatsoever.*
2. *The learned trial magistrate erred in law and fact in basing his finding on irrelevant matters.*
3. *The respondent's case was not proved on balance of probability (sic) as is required by law.*
4. *The learned trial magistrate's award of damages was inordinately too high and manifestly excessive for the soft tissue injuries allegedly suffered.*
5. *The learned trial magistrate erred on all points of fact and law in as far as both liability and award of damages is concerned.*

Submitting for the appellant learned counsel Mr Lolei argued that no negligence was proved by the evidence tendered before the trial magistrate, which evidence, according to counsel, was not only contradictory but demonstrated that the respondent was in total control of his situation and therefore wholly to blame for his alleged injury. He submitted further that the injury was not proved by medical evidence since only a medico-legal report was produced without the benefit of treatment charts to prove that the injury did in fact occur. On quantum, counsel submitted that the same was inordinately high given the fact that the plaintiff suffered only soft tissue injuries. He argued that, although in his view, the injuries were not proved a sum of 10,000/= would have been adequate to compensate the respondent in any event.

Opposing the application learned counsel Mr. Kisila submitted that the appeal was devoid of merit as it did not point to any error of law or principle on the part of the learned trial magistrate but only sought to dispute facts as were tendered in evidence. Mr. Kisila submitted that the respondent's case having been founded on a breach of a common law duty of care by the appellant, evidence ought to have been tendered to rebut the plaintiff's evidence since the failure by the appellant to provide the respondent with a secure ladder was tantamount to denying the respondent a safe environment to do the work assigned to him. Counsel submitted further that the respondent's contention that he was injured while working for the appellant was also not adequately rebutted. He referred the court to the lower court's rejection of a muster roll which the appellant had sought to rely on in an attempt to prove that the respondent was not its employee and could therefore not have been working for the appellant when he was injured. To support the respondent's case Mr. Kisila cited three authorities, namely;

(i) Ephantus Mwangi & Geoffrey Nguyo Ngatia

vs. Duncan Mwangi Wambugu (1983)

(ii) Kemfro Africa Limited t/a Meru Express Service, Gathogo Kanini

vs. A. M. Lubia and Olive Lubia [1982-88]1 KAR page 727

(iii) Nakuru Timsales vs. Kepha M. Njomo Civil Appeal No. 28 of 2001.

He submitted that the medico legal report produced by the respondent was sufficient to prove the injury. He also challenged the award as being low on the basis that the same was influenced by old authorities tendered before court and which ought not to have been considered.

The respondent's testimony in chief was that on 4th of August 1999 he was employed as a casual worker by the defendant at its premises where he was assigned the task of demolishing houses under the supervision of one Njuguna. He was working with three others but he alone on the roof of a building where he was removing iron sheets while his colleagues arranged the timber. According to him a 2 x 2 timber that was supporting the iron sheets broke and he fell. He was later to learn that the timber was rotten. He was injured on his left leg which was treated at "Nyayo Ward" on the same day. On 4th December 2000 he was examined by Dr. Kiamba who assessed the degree on injury as harm and compiled the medical report tendered by the respondent in evidence. He blamed the appellant for not supplying him with a step ladder which he believes would have avoided the accident, if used, instead of the rotten timber the respondent was forced to step on while working. Under cross-examination the respondent stated that they (*presumably himself and his co-workers*) had made a ladder but that it was not the ladder that caused him to fall. They did their work while stepping on a 2 x 2 timber and it is the one that made him fall. The defendant called only one witness (*Joseph Wanga*) to testify in its defence. He admitted that he knew the respondent as a casual worker of the appellant but adduced no evidence in regard to the alleged accident and injury. His evidence related only to the records kept for the attendance of the appellant's workers which did not clearly show that the respondent was not working for the appellant at the material time as claimed by him.

The medical report tendered by the respondent at the trial showed that the he suffered soft tissue injuries to the left leg as evidenced by extensive scars on the shin. These were noted by the examining doctor Dr. Kiamba whose report was admitted by consent. Before arriving at her award the learned trial magistrate found that the appellant failed to provide the plaintiff with a safe working environment and was therefore liable to compensate him for the injury. She found the respondent's testimony to be consistent and credible it having not been denied that the construction work he talked about was going on at the appellant's premises. The learned trial magistrate was convinced that, on a balance of probabilities, the plaintiff had established his claim to injury. She however found him 20% to blame on the basis that he ought to have taken care of his own safety, being aware of the dangerous nature of the task assigned to him. I am of the same persuasion as the learned trial magistrate that the plaintiff did prove, on the balance of probabilities, that he was injured at the appellant's premises on 4th August 1999. It was admitted by the appellant's own witness that the respondent was a casual employee of the appellant. The

witness also admitted that the appellant did have two supervisors by the name Njuguna. The appellant gave no evidence whatsoever to refute the respondent's claim that a safe environment had not been provided for him to carry out the task assigned to him.

A safe system of work requires that the conditions and/or apparatus used by employees to discharge their duties are safe and/or of such quality as would ensure that the employees are not exposed to the risk of injury. Guided by the principle that an appeal court will not interfere with an assessment of damages by a lower court unless it is satisfied that the trial court, in assessing those damages, either took into account an irrelevant factor or disregarded a relevant one or that the award made by that court is either so inordinately low or so inordinately high as to constitute a wholly erroneous estimate, I find that the award made herein was rightly arrived at and need not to be disturbed. It conforms with the nature of injuries as supported by the medical legal report produced as evidence with the consent of both parties and is not excessive. I see no basis upon which to interfere with the lower court's finding on liability or quantum. In the circumstances the appeal is dismissed with costs to the respondent.

Dated signed and delivered at Nakuru this 6th day of November 2009

M. G. MUGO

JUDGE