



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**  
**APPEAL NO. 11 OF 2015**

**(Originally Naivasha High Court Civil Appeal No. 16 of 2015)**

**DUNCAN NJOGU**

**APPELLANT**

**v**

**LAUREL INVESTMENTS LIMITED**

**RESPONDENT**

**(Being an appeal from the judgment/decree of Hon. Mutegi, Senior Resident Magistrate delivered on 20<sup>th</sup> January 2015 in Engineer SRMCC No. 50 of 2014)**

**JUDGMENT**

1. This appeal was transferred from the High Court Naivasha on 24 September 2015.
2. Directions were issued on 18 February 2016 and the Appellant filed his submissions on the same day while the Respondent filed its submissions on 18 March 2016.
3. This appeal was prompted by a judgment delivered on 20 January 2015 by the Senior Resident Magistrate's Court sitting at Engineer, in a cause of action founded on negligence (industrial accident)
4. The trial Court found the Respondent 70% liable to the Appellant, and awarded general damages of Kshs 60,000/- and special damages of Kshs 5,000/-.
5. After apportioning liability, the Appellant ended up with Kshs 42,000/- as general damages, Kshs 5,000/- special damages and costs.
6. The Appellant, being aggrieved filed a Memorandum of Appeal with the High Court Naivasha and he set out some 4 grounds of appeal, to wit,

*1. THAT the trial Magistrate failed to critically evaluate the evidence on record and failed to accord the Plaintiff's evidence and submissions due weight to the extent that it was able to demonstrate the nature of injuries suffered by the Plaintiff.*

*2. THAT the learned trial Magistrate erred in law and in fact on relying on the Respondent's submissions alone and findings on liability without any evidence from the Respondent.*

*3. THAT the trial Magistrate erred in law and in fact in failing to consider and analyse the Plaintiff evidence and submissions on record and proceeded to award very low quantum compared to the injuries suffered by the plaintiff.*

4. *THAT the learned trial Magistrate erred and misdirected himself in fact and law by awarding damages to the Appellant that were manifestly low in the circumstances and thus failed to appreciate the principles applicable in the award of damages.*

7. The role of a first appellate Court on appeal has been set out in several authorities such as *Jabane v Olenja* (1986) KLR 661 (to reconsider and re-evaluate the evidence adduced by the witnesses before the trial Court and the findings made thereon).

8. The Court will proceed to examine, evaluate and analyse the appeal bearing in mind the above stated principles.

### **Ground 1**

9. The injury pleaded by the Appellant was fracture of the left radius styloid process.

10. The medical report by Dr. Wellington Kiamba dated 6 November 2013 indicated that an x-ray showed a fracture of the left radius styloid process from which the Appellant had recovered from except for stiffness which required 2 months of physiotherapy.

11. The Respondent's medical officer in a report dated 27 February 2014 noted that there was no fracture of the radial styloid and opined that the Appellant had sprained his left wrist.

12. The initial medical note indicated that an x-ray was to be taken and recommended that the Appellant be put on one month medical off duty.

13. In the submissions filed in the lower Court, the Appellant contended that the injury was a ***sprain of the left wrist joint.***

14. The Appellant now contends that the Court did not consider the nature of injuries as indicated in his doctor's medical report and relied solely on the report by the Respondent's doctor.

15. It is clear that the two medical reports were inconsistent. The Appellant's doctor indicated there was ***a fracture*** while the Respondent's doctor indicated the injury as ***a sprain.***

16. Both parties were aware of the inconsistencies in the medical reports before the trial.

17. The Appellant sought an adjournment to call Dr. Kiamba but there is nothing on record to show why he was not called to testify before close of Appellant's case.

18. Instead, the parties agreed to produce the report prepared by the Respondent's doctor by consent.

19. The trial Court had 2 inconsistent medical reports and relied only on one.

20. The Appellant being aware of the inconsistent medical reports ought to have gone a step further and proved the nature of his injuries. That was both a legal and evidential burden placed upon him by the law.

21. Documents in a court of law ordinarily go through a 3 stage process.

22. These are production, admissibility and proof of the contents of the document. The medical reports here were produced and admitted but there was no proof of the contents.

23. It was imperative for the Appellant to prove his injuries, but he did not. In fact, in his examination in chief he testified of having sustained a *dislocation.*

24. It is not clear to me whether *fracture, sprain and dislocation* are similar in medical terms.

25. In my view, the trial Court properly evaluated the nature of injuries as was conceded by the parties as reflected in the medical report by the Respondent's medical officer.

## **Ground 2**

26. The Appellant also contested the judgment on the ground that the trial Court only considered the Respondent's evidence on liability.

27. The Appellant's testimony was that he slipped on a muddy stretch going downhill while he was in the course of duty and that at the time he had worn out gumboots which he had requested the Respondent to replace.

28. The Respondent did not call any witness to controvert the Appellant's testimony. A feeble attempt was made to challenge the testimony on cross examination. But that is what it was, a feeble attempt.

29. In my view, the trial Court was in error of both fact and law. The uncontroverted and unchallenged testimony before him was that it was muddy and the Appellant had worn out gumboots which had been brought to the Respondent's attention.

30. That such a muddy condition without proper gumboots posed a danger to the Appellant would lead to the conclusion that the Respondent had failed in its obligation to ensure a safe working environment.

31. The Respondent therefore ought to have been solely liable.

## **Quantum**

32. Grounds 3 and 4 more or less question the award of damages.

33. The trial Court awarded Kshs 60,000/- discounted by 30% contribution by the Appellant.

34. The Appellant cited only one authority before the lower Court.

35. In that authority, *Kiwanjani Hardware Ltd & Ar v Nicholas Mule Mutinda* (2008) eKLR, the party had suffered soft tissue injuries particularised as blunt injury to the head with loss of consciousness, blunt injury to the neck, a cut to the throat, blunt injury to the left shoulder and back, blunt injury to the chest, blunt injury to the right forearm and deep penetrating wound on the left leg with cuts and bruises on the same leg.

36. With a lot of humility to the Appellant, he did not bring to the attention of the trial Court, material or relevant authority.

37. The trial Court relied instead on the authority of *Sokoro Saw Mills Ltd v Grace Nduta Ndungu* (2006) eKLR cited by the Respondent where Kshs 30,000/- had been awarded.

38. In my view, the trial Court was not in error when it made the award considering the authorities cited by the parties.

39. And a perusal of precedent on the role of an appellate Court in a case such as this show that the legal principle that an appellate Court ought not to disturb an award of damages unless it is so inordinately high or low so as to represent an entirely erroneous estimate based on wrong legal principle or misapprehension of the evidence.

40. The Court reaches the conclusion the award on quantum ought not to be disturbed.

## **Conclusion and Orders**

41. The upshot of the foregoing is that the Court upholds the appeal singly on the issue of liability and overturns the findings on liability which is substituted with a finding that the Respondent was 100% liable for the injuries.

42. The effect being that the Appellant is awarded Kshs 60,000/- as general damages.

43. Appellant to have costs both of the lower Court and in this Court.

**Delivered, dated and signed in Nakuru on this 2<sup>nd</sup> day of September 2016.**

**Radido Stephen**

**Judge**

**Appearances**

For Appellant                      Achieng Owuor & Co. Advocates

For Respondent                      Munene Wambugu & Co. Advocates

Court Assistant                      Nixon