



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**

**CIVIL APPEAL NO. 122 OF 2012**

HIGHLANDS MINERAL WATER COMPANY.....APPELLANT

**VERSUS**

PURITY WAMBUI MURIITHI..... RESPONDENT

*(Arising from the judgment of Hon. J. Wambilyangah, Senior Resident Magistrate Nyeri in CMCC  
No. 48 of 2012)*

**JUDGMENT**

1. By a plaint dated 14th February 2012 and filed in court on 21st February 2012 the Respondent sued the Appellant in respect of injuries sustained by the same on 10th March 2011 while lawfully working for the Appellant. The Respondent pleaded that the accident was as a result of breach of contractual obligations and obligations pursuant to the statute.
2. As a result of the said injuries the Appellant sustained the following injuries;-
  - a) Injuries to the left elbow.
  - b) Injuries to the pelvic region.
  - c) Lower back injuries.
3. On 30th March 2012 the Appellant filed a defence wherein it denied the said accident and particulars of breach of statutory or contractual duty and further attributed the said accident to the negligence on the part of the Respondent.
4. Based upon the said pleading the matter proceeded for hearing before Hon. J. Wambilyangah SRM who found the Appellant liability of 100% and accorded general damages of Kshs.700,000/- and specials of Ksh. 5000
5. Being aggrieved by the said judgment the Appellant filed the appeal and raised the following grounds of appeal;-
  - (i) That the learned magistrate erred in both law and in fact when he awarded a sum of Kshs.700,000/- as damages for injuries suffered which amount is manifestly excessive and high in the circumstances and connotes an erroneous estimate of the damages suffered.

- (ii) That the learned magistrate erred in fact and in law by failing to follow rules of precedents in awarding general damages.
- (iii) That the learned magistrate erred in both law and in fact for considering irrelevant matters in arriving at the said decision in favour of the Respondent as against the Appellants.
- (iv) That the learned magistrate erred in law and in fact in failing to consider or ever adequately adopt and appreciate the written submissions of the appellants on record.
- (v) That the learned magistrate erred in both law and in fact in failing to find that the plaintiff's pleadings and evidence tendered thereof were incapable of sustaining any award of damages.
- (vi) That the learned magistrate erred in both law and in fact when he held that the appellant was negligent 100% when absolutely no evidence was led at the trial in that regard.

## **SUBMISSIONS**

6. Directions were given that this appeal be determined by way of written submissions which have now been filed. On behalf of the Appellant it was submitted that the award of Kshs.700,000/- was excessive and high. It was submitted that as per the case summary produced as exhibit No. 2 the X-ray conducted shows that the Respondent was normal. It was further submitted that the Respondent produced no evidence of further clinic visit or physiotherapy sessions and that the trial magistrate took into account the unproved allegation that the Respondent was hemorrhaging from the vagina as a result of the accident in awarding the Kshs.700,000/-.

7. It was submitted that on the authority of MBAKA NGURU & ANOTHER VERSUS JAMES GEORGE RAKWAR COURT OF APPEAL AT NAIROBI CIVIL APPEAL NO. 133 OF 1998 this court ought to interfere with the judgment. It was further submitted that the trial court did not follow the High Court authorities submitted and thereby gone against the decision in the case of OSSUMAN MOHAMMED & ANOTHER VERSUS SALURO BUNDIT CIVIL APPEAL NO. 30 OF 1997 that damages must be within limits set out by decided cases.

8. It was further submitted that the trial magistrate erred by taking the medical report of Dr. Zachary as conclusive evidence of the alleged irregular menstrual bleeding against the Doctor's evidence in cross examination. It was submitted that the trial court did not consider the Appellant's written submissions that the occurrence of an industrial accident per se does not connote negligence on the part of the employer and that the Respondent had to prove negligence. In support thereof the case of STAPACK INDUSTRIES LTD VERSUS JAMES MBITHI MUNYAO NRB HCCA NO. 152 OF 2003 was submitted.

9. On behalf of the Respondent it was submitted that the award was based on the evidence of PW 2 which was not rebutted by any medical evidence from the Appellant and that the court in reaching the award considered the relevant evidence before her and that the court ruled that the authorities produced by the Appellant were irrelevant and that the court considered the provision of Occupational Safety and Health Act which sets the duty of the occupier.

10. This being a first appeal the court is under duty to reassess the evidence tendered before the trial court and to come to its own conclusion thereto. It was the Respondent's case that she was employed by the Respondent and on 10/3/2011 had been given the work of washing the production area and as she was cleaning she slide and fell down. It was her evidence that she fell down when she reached an area where oil was leaking. As a result of the fall she got injured on the pelvic region and started bleeding.

11. Under cross examination she stated that she was cleaning using bucket, soap and brushes and they were two people. She had cleaned the area for about 3 months and it was her duty to wash the leakage. She confirmed that she had rubber shoes.

12. PW 2 Zachary Githui Mwaniki an Occupational Therapist testified on behalf of the respondent and stated that the Respondent sustained soft tissue injuries on the left elbow, soft tissue injury on pelvic region, lower back pain, soft tissue injury on the left knee and around the tibia bone. Under cross examination he stated that he advised the Respondent to consult a gynaecologist.

13. On behalf of the Appellant DW 1 MERCY WANJUGU confirmed that she was working with the respondent washing the production area when she fell down and that there was oil spill in the area. DW 2 JOYCE MUTHONI NDERITU testified that there was no oil spilt at the place when the Respondent fell down and that it was soap that made the Respondent fall down.

## **ISSUES**

14. From the pleadings, submissions and proceedings as set out herein the court has identified the following issues for determination:-

- a) Did the Respondent prove her case against the Appellant on liability?
- b) Was the award of Kshs.700,000/- excessive?
- c) What order should this court give?

15. Whereas the Appellant had the statutory duty under section 6(2)(d) of the Occupational Safety and Health Act this statutory duty does not mean that the employee is not under obligation as regards their safety. The evidence tendered before the trial court shows that it was the duty of the Respondent to keep the place clean and that she fell while performing this duty. The Respondent in her evidence stated that the said machine with oil had been there for eight (8) months and therefore she owed a duty of care to herself and to the other employees.

16. It is therefore clear that the magistrate fell into error when she found the Appellant liable at 100% without considering the evidence tendered and would therefore allow this ground of appeal. On the evidence tendered before the court I would assess liability at 50%:50% between the Appellant and the Respondent.

17. On the evidence tendered, it is not disputed that the Respondent sustained soft tissue injuries. In arriving at an award of Kshs.700,000/- the trial magistrate relied on the case of MAHAMED FAMIL SHEKUE V MBUNI TRANSPORTERS CO LTD HCCC NO. 267 OF 1993 MOMBASA. Where in the plaintiff sustained a fracture and dislocation of the right hip joint and central dislocation of the left hip these injuries can not be said to be similar to those sustained by the respondents herein which were described by PW 2 as soft tissue injuries.

18. It is therefore clear that the trial court applied wrong principle in assessing general damages and as such her award is liable to be interfered with by the Appellate court. I would therefore allow the appeal and set aside the award of general damages.

19. This being a first appeal I would therefore proceed to assess the general herein but must first of all point out that PW 2 was not qualified as an expert witness in this matter being an occupational therapist. I have looked at the case of PYRAMID PACKAGING LTD VERSUS PATRICK NAMASAKA ELDORET CIVIL APPEAL NO. 98 OF 2007 submitted by the Appellant wherein he awarded Kshs.100,000/- in respect of the respondent who had sustained soft tissue injuries. SOUTH NYANZA SUGAR CO LTD V JOHN OWINO HIGH COURT AT KISII CIVIL APPEAL NO. 99 OF 2005 where ASIKE MAKHANDIA J as he then was confirmed an award of Kshs.50,000/- for soft tissue injuries on 31st March 2011.

20. I have also looked at ESTHER KIMATHI IKUNYUA AND ANOTHER V REAL GAKII HIGH COURT AT MERU CIVIL APPEAL NO. 75 OF 2005 [2011] e KLR where MARY KASANGO J on 13th April 2011 assessed general damages at Kshs.160,000/- in respect of soft tissue injuries.

21. From the above authorities and having taken into account the injuries sustained by the respondent I am of the considered opinion that an award of Kshs.150,000/- would be an adequate compensation and therefore award the same .

22. I therefore allow the appeal herein and set aside the judgment of the trial court and substitute the same with the following;-

- a) **Liability 50%:50%**
- b) **General damages Kshs.150,000/-**
- c) **Special damages Kshs.5000/-**
- d) **Costs to the Respondent.**

*Date and delivered at Nyeri this 27th day of June 2014.*

**J. WAKIAGA**

**JUDGE**

Court: Judgment read in open court in presence of Miss Thungu for Miss Mukuha for Respondent. No appearance by the appellant.

**J. WAKIAGA**

**JUDGE**

**27/6/2014**