



**Lokola v James Finlay (K) Ltd (Civil Appeal 21 of 2010)  
[2022] KEHC 16478 (KLR) (16 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16478 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERICHO  
CIVIL APPEAL 21 OF 2010  
AN ONGERI, J  
DECEMBER 16, 2022**

**BETWEEN**

**JOSEPH EKOMI LOKOLA ..... APPELLANT**

**AND**

**JAMES FINLAY (K) LTD ..... RESPONDENT**

*(Being an appeal from the Judgment and decree of Hon Okuche  
(SRM) in Kericho PMCC No.932 of 2004 delivered on 12/4/2010)*

**JUDGMENT**

1. The appellant filed PMCC No 932 of 2004 seeking general damages and special damages plus costs of the suit for injuries the appellant sustained while working for the respondent when he was cut with a panga.
2. The appellant's evidence in summary was that the appellant was working for the respondent as a casual labourer at Chebitet Estate at the material time.
3. On October 14, 2003 while in the course of his employment in field 24 at Chebitet farm, the appellant was cut with a panga in his left thumb.
4. The appellant alleged that he was issued with a defective panga and attributed the injury to the negligence of the respondent.
5. The appellant reported the accident to his supervisor and he was given a note to go to hospital.
6. The respondent called one witness who said all employees at the respondent's farm were trained on how to use pangas and were issued with gloves. DW1 further said there was no report made to him of the accident.



7. The trial court found that the appellant had failed to prove his case on a balance of probabilities and he dismissed the suit.
8. The appellant has appealed to this court on the following grounds;
  - i. That the honorable magistrate erred in law and in fact in finding that the appellant had not proved his case on a balance of probability;
  - ii. That the learned magistrate erred in law in finding that the appellant had not proved negligence on the part of the respondents despite the concrete and introverted evidence on record;
  - iii. That the learned magistrate erred in law and fact in relying entirely on the evidence offered by the defence notwithstanding that the same was unreliable and full of inconsistency;
  - iv. That the learned magistrate erred in law and in fact in disregarding and failing to appreciate the evidence offered by the plaintiff;
  - v. That the learned magistrate erred in law and in fact in making a finding not based on the evidence on record;
  - vi. That the learned magistrate applied the wrong principles of law in making his findings;
  - vii. That the learned magistrate erred in law and in fact in failing to set points for determination then determine them according to the law.
9. The parties filed written submissions in this appeal as follows;

The appellant submitted that the respondent had a duty to provide a safe working environment for its employees and that the employer's duty is a duty of care and they are required to take all reasonable precautions for the safety of the employee.
10. The appellant submitted that he sufficiently proved his case in court on a balance of probability and had the court not disregarded the documents and evidence tendered in court by the appellant, the learned magistrate would have reached to this decision.
11. It was submitted that negligence on the part of the respondent was proved by the appellant in that the appellant testified that the handle of the defective panga that he was issued broke off and he got cut on the left hand, whereas the respondent did not adduce any evidence to controvert having issued a defective panga, and as such negligence on the part of the respondent has been clearly brought out.
12. The appellant submitted that an award of Kshs 100,000 will sufficiently compensate him and special damages of Kshs 2000 which has been specifically pleaded and proved.
13. The respondent on the other hand submitted that the trial magistrate did not error in holding that the appellant's case was not proved on a balance of probability as the appellant's case was not supported by evidence to the effect that the respondent was entirely negligent and/or responsible for the injuries incurred by the appellant.
14. It was submitted that it is trite that he who alleges must prove and further, he who pleads negligence has to prove a casual link between the injuries sustained and the duty of care placed upon the employer but the appellant's evidence does not give any clear information to warrant the respondent being held liable for the injury.



15. It was also submitted by the respondent that it is upon the appellant to prove that the injuries occasioned were as a result of the respondent's negligence and that it is not enough that by the mere fact that the appellant worked for the respondent and that he got injured while at work, then the respondent ought to be held liable; and further that the appellant was the author of his own misfortunes as such he did not prove his case entirely on a balance of probability as required.
16. The respondent in his submissions stated that the appellant did not prove his claim on a balance of probability to warrant the respondent being held 100% liable and that the court should find that the trial magistrate's decision not to issue an award was sufficient.
17. It was submitted that the appellant suffered a cut injury on the left thumb as per the medical report, which were described as soft tissue injuries, and that he suffered no permanent disability as such the trial court's decision not to award damages was adequate taking into consideration the nature of the appellant's injury and circumstances of the case and therefore the trial magistrate's findings on points of law and facts in as far as both liability and assessment of quantum is concerned were accurate and no error was occasioned.
18. This being a first appeal, the duty of the first appellate court is as follows; -  
to re-evaluate, re-analyze and re-consider the evidence and draw its own conclusion, bearing in mind that it has neither seen nor heard witnesses and should make due allowance in this respect.
19. The court of appeal in *Gitobu Imanyara & 2 Others V Attorney General* (2016) eKLR, stated as follows:- "This being a first appeal, it is trite law, that this court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect."
20. In *Bwire v Wayo & Sailoki* (2022) KEHC 7 (KLR), the court stated as follows regarding the duty of the 1<sup>st</sup> appellate court: - "A first appellate is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand."
21. The sole issue for determination is whether the trial court erred in dismissing the appellant's case for want of evidence.
22. I find that the appellant failed to discharge the burden of proof imposed by law which is on a balance of probabilities.
23. The trial court found that the appellant was in control of the panga and that it was his duty to ensure that he does not cut himself.
24. I agree with the finding of the trial court that the Respondent was not in breach of duty of care.
25. I find that the appeal has no merit and I dismiss it accordingly.
26. Each party to bear its own cost of the appeal.

**DELIVERED, DATED AND SIGNED AT KERICHO THIS 16<sup>TH</sup> DAY OF DECEMBER 2022.**

**A. N. ONGERI**



**JUDGE**

