REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 128 OF 2004

JACKSON MWANGI GATAMA ..... APPELLANT

-V E R S U S –

KENYA WILDLIFE SERVICES ..... RESPONDENT

(An appeal from the judgement delivered on 30th January, 2004 at Nairobi by the Hon. Mrs H. Omondi, CM in Milimani CMCC no. 458 of 1998)

JUDGEMENT

1) Jackson Mwangi Gatama, the appellant herein, filed a compensatory suit against Kenya Wildlife Services, the respondent herein, before the Chief Magistrate's Court, Milimani Commercial Courts, Nairobi for the injuries the appellant allegedly sustained while working for the respondent as a mechanic in Abardare National Park. The respondent filed a defence to deny the appellant's claim. Hon. H. A. Omondi,learned Chief Magistrate heard the suit and in the end, she dismissed the suit for want of merit. The appellant felt aggrieved hence he preferred this appeal whereof he put forward thefollowing grounds in his memorandum:

> ***1. The learned trial magistrate erred in fact in the way she weighed evidence of both parties thereby holding that the appellant had failed to prove his case.***
>
> ***2. The learned trial magistrate erred in fact by dismissing the appellants claim on the basis of paragraph 1 above.***
>
> ***3. The learned trial magistrate erred in fact by failing to take into consideration that the circumstances leading to the appellants injuries were quite clear from the evidence on record.***
>
> ***4. The learned trial magistrate erred in fact by holding that the appellant's evidence did not support his pleadings.***

2) When the appeal came up for hearing, learned counsels recorded a consent order to have the same disposed of by written submissions.

3) I have re-evaluated the case that was before the trial court. Ihave also considered the rival submissions. Though the appellant put forward a total of four grounds of appeal, the main ground that commends itself for determination is whether the learned Chief Magistrate erred by dismissing the suit for lack of evidence to support the action. It is the submission of the appellant that he tendered credible evidence to support his claim that he was hit by a tyre whereas the learned Chief Magistrate held that the appellant had failed to present evidence to prove that he was hit by a motor vehicle. The respondent opposed the appeal arguing that the evidence presented were not in sync with the pleadings therefore the learned Chief Magistrate was right to dismiss the appeal.

4) The record shows that the appellant testified in support of his case without summoning independent witnesses. The respondent on the other hand closed its case without summoning any witnesses to support its defence. The appellant (PW1) told the trial court that on 21.7.1994 he was in the respondent's offices at Aberdare National park with the workshop manager. He said he was employed as a mechanic. PW1 stated that some people had been assigned to do some work on a tipper went to the manager's office where they requested to be given advise on the work of removing the tipper's front tyre. PW1 said that the workshop manager asked him to accompany them to the site and advise them and he obliged. The appellant said he was seated between the workers as they tried to push the tyre out of the tipper. PW1 said, the tyre bolted out and hit him in the leg while he was seated. He said the workers had not warned him that they were going to remove the tyre. The appellant accused the respondent for failing to provide the workers with the puller to stabilize the tyre. Having received such kind of evidence, the learned Chief Magistrate nevertheless ruled that the evidence did not support the pleadings which says that the appellant was hit the said motor vehicle yet the evidence is that he was hit by a tyre.

5) In paragraph 5 of the amended plaint the appellant avers that hewas injured by the motor vehicle which was under repair. When he tendered his evidence he said that the respondent had failed to give the workers a puller to stabilize the tyre, forcing it to bolt out thus hitting him. The tyre is one part of a motor vehicle. That piece of evidence was not controverted by the respondent. The learned Chief Magistrate therefore misapprehended the point when she ruled that the appellant failed to present evidence in support of his case.

6) After a careful re-evaluation of the evidence presented before the trial court, I am satisfied that the appellant proved his case on a balance of probabilities, therefore judgment should have been entered in favour of the appellant.

7) The other issue which this court has been asked to determine iswhether or not the case should be remitted back to the trial court for a fresh hearing. The appellant has tersely invited this court to either remit the case for retrial or in the alternative set aside the trial court's dismissal order and instead find the case in favour of the appellant. The respondent is of the view that this court should not make an order for retrial but instead dismiss the appeal altogether. An order for retrial can be made where the appellate court is of the opinion that the trial was not conducted satisfactorily. Having critically examined the proceedings conducted by the trial court, I am convinced that the same were properly conducted, therefore there is no need to order for a retrial.

8) The other issue which was not determined by the trial Chief Magistrate is the question of quantum. That was an error which this court can correct on appeal. It is always desirable that in cases where compensation is demanded to be paid, that the trial court should determine quantum even where the suit is being dismissed. The appellant's medical report prepared by Dr. Kioria had been produced by consent. The report shows that the appellant suffered a fracture of the right medial malleolus. The appellant had asked to be paid ksh.400,000/= for general damages and ksh.1,500/= for special damages. The respondent did not propose any figures to the trial court. On appeal, the appellant has urged this court to award him ksh.600,000/=. The respondent did not also propose any figures on quantum on appeal. I have considered the case of **Meshack Allan Olang =vs= Eric Gowi H.C.C.C. no. 2371 of 1990 – Nairobi (Unreported**), where the plaintiff was awarded ksh.400,000/= for a fracture of the right femur and concussion of the head. It is apparent that the plaintiff in the cited authority suffered more serious injuries than the appellant herein. In the circumstances I will award the appellant ksh.300,000/=. It is apparent he proved ksh.1,500/= for special damages.

9) In the end the appeal is allowed giving rise to the following orders:

i. The order dismissing the suit is set aside and is substituted with an order entering judgement in favour of the plaintiff (now appellant) and against the defendant(now respondent).

ii. The plaintiff (now appellant) is awarded ksh.300,000/= and ksh.1,500/= being general damages and special damages respectively.

iii. **Costs of the appeal and that of the suit are awarded to the appellant.**

Dated, Signed and Delivered in open court this 25th day of May, 2018.

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondents