



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 157 OF 2016**

**HENRY WASIKE .....APPELLANT**

**VERSUS**

**CHINA JIANGXI INTERNATIONAL K LTD .....RESPONDENT**

*(Being an appeal from the judgment and order of the Hon. Principal Magistrate L.M Wachira at Nairobi on the 24<sup>th</sup> March, 2016)*

**JUDGMENT**

The appellant was employed by the respondent when in the cause of that employment he was injured and brought a claim for damages against the respondent. The respondent denied the claim and after the hearing in the lower court, the appellant's suit was dismissed with costs.

Aggrieved by the said judgment he filed this appeal, faulting the trial court for dismissing his suit without regard to the evidence tendered. He also complained that the trial court was wrong to have held that he did not prove his case on a balance of probability or the required standards. Finally, he complained that the trial court did not consider the pleadings on record and submissions by both parties. Both parties have filed submissions which I have read.

The appellant in the course of his employment was assigned the duty of collecting building stones from a stack and move the same to a construction site. According to his evidence, the stack was three metres high when one of the stones fell on him causing the injuries complained of. He gave evidence in support of his pleadings alongside the evidence of Dr. George Kungu Mwaura who examined him in preparation of the medical report which he produced.

The defence on the other side called on witness who told the court that it was not possible for anyone to arrange the stones to three metres high and be able to remove them using his hands. He told the court that it was the appellant who was negligent and cannot be able to assign the injuries to anyone else. On the contrary, the appellant was pushing the stones on a wheelbarrow where one of the stones fell off and injured him.

In dismissing the appellant's case, the trial court said in part as follows,

**“With utmost respect to the plaintiff I am in agreement with the defendant. It is unlikely that the plaintiff who stated that he is about two metres (again which is unlikely) to be able to collect stones that are 3M high in stack. The likely scenario is as given by the defence witness.”**

As required of me, I have evaluated the evidence given in the lower court. As to the occurrence, it is the evidence of the respondent as against that of the only witness called by the defence. Proof in civil proceedings is on a balance of probability. Although the appellant alleged he had not been provided with protective gear, he admitted that indeed was provided but he said the Chinese had taken them back. This was contradicted by the evidence of the defence witness.

It is clear from the evidence adduced that, the defence case outweighed that of the appellant and in my assessment, the trial court had no alternative but to dismiss the appellant's case. The trial court went ahead and assessed damages payable to the appellant had his case succeeded. That assessment cannot be faulted in view of the injuries sustained by the appellant. I would have endorsed the same had this appeal succeeded. However, the end result is that this appeal fails and therefore dismissed with each party bearing their own costs.

***Dated, signed and delivered at Nairobi this 20<sup>th</sup> Day of December, 2018.***

**A. MBOGHOLI MSAGHA**

**JUDGE**