



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL NO. 392 OF 2009**

**ERNIE CAMPBELL & COMPANY LIMITED.....APPELLANT**

**- V E R S U S -**

**ANTONY KAMTEKA..... RESPONDENT**

***(Appeal from the judgement of Senior Resident Magistrate Mrs. Owino in Thika CMCC no. 745 of 2006)***

**JUDGEMENT**

1. Antony Kamteka, the respondent, filed a compensatory suit before the Chief Magistrate's Court Thika, against Ernie Campbell & Co. Ltd, the appellant herein, for the injuries he sustained while carrying out repairs on the appellant's premises. The suit was heard and determined largely in favour of the respondent. Being aggrieved, the appellant preferred this appeal to impugn the trial court's decision.

2. On appeal, the appellant put forward the following grounds:

***1. The learned magistrate erred in law and fact by believing the plaintiff/respondent's evidence which was manifestly false and full of contradictions.***

***2. The learned magistrate erred in law and fact by holding that liability had been proved even though the evidence before court showed otherwise.***

***3. The apportionment of liability was wrong in view of the court's finding that the plaintiff/respondent was largely to blame for the accident.***

***4. The learned magistrate erred in law and in fact by awarding general damages that were manifestly grossly excessive in the light of the injuries suffered and the evidence before the court.***

***5. The learned magistrate erred and, or misdirected herself while exercising her discretion in the assessment of damages.***

***6. The learned magistrate erred in law and fact by holding that the plaintiff/respondent had suffered a dislocation of his right shoulder while medical evidence before her was to the contrary.***

***7. The learned magistrate erred in law and fact by failing to address or even consider the various authorities sited and relied upon by the parties in their submissions.***

3. When the appeal came up for hearing, learned counsels recorded a consent order to have the appeal disposed of by written submissions. Though the appellant listed 7 grounds of appeal, those grounds revolve around the questions over liability and quantum. I have re-evaluated the case that was before the trial court. I have also considered the rival submissions. It is the submission of the appellant that the decision on liability is not supported by the evidence presented. It is also submitted that the order on apportionment of liability was wrong. The respondent is of the view that the decision on liability is supported by the evidence tendered hence it should not be interfered with. I have on my part re-examined the evidence presented before the trial court and the manner the trial magistrate treated the evidence. In her brief judgment, Hon. Owino the learned Senior Resident Magistrate, stated that at the time of the accident the respondent was an employee of the appellant. She also stated that it is agreed that the accident occurred whilst the respondent was carrying out the duties he was assigned by the appellant. She further stated that the respondent was an experienced and seasoned carpenter hence to a large extent he should be held accountable. She expressly stated that the respondent ought to have taken better precaution for his safety. The Learned Senior Resident Magistrate proceeded to apportion liability of 40% as against the respondent and 60% as against the appellant. The respondent told the trial court that on 9<sup>th</sup> December 2004 he assigned the duty to fix iron sheets on the roof of the appellant's premises. He said that he stepped on a board and slipped while alighting. As a result of falling the respondent said he was injured in the hand and shoulder. He claimed he was not given any protective clothes. The respondent stated that while climbing, he used the ladder but while climbing down he did not use the ladder. He then slipped and fell down. He said the wood was wet and loose. The appellant summoned Nicholas Mulinge Ngata (DW1) the appellant's general foreman to testify. DW1 stated that the respondent did not use the ladder but he instead took a short by jumping through the ceiling canopy and fell down. DW1 blamed the respondent for taking a short cut which was risk thus exposing himself to danger. He further pointed out that the respondent was a good workman who was not keen to use a helmet and overalls. DW1 claimed that the respondent was issued with a helmet and an overall.

4. After a careful consideration of the evidence presented by both Sides, I am convinced that the appellant's general foreman (DW1) failed to ensure that the workmen including the respondent complied with the rules requiring them to put on overalls and helmets. DW1 simply watched the respondent work without those protective garments. From the evidence tendered I am convinced that both the appellant and the respondent should share blame in equal measure. Consequently the order apportioning liability at 60:40 should be set aside and be substituted with an order apportioning liability at the ratio of 50:50.

5. On quantum, the respondent was awarded ksh.150,000 as general damages while no award was made on special damages. The appellant complained that the aforesaid award was not justified at all by the learned Senior Resident Magistrate. With respect, I agree with the appellant's submission that the trial magistrate did not assign any reasons for the award. The record shows that the respondent had sought to be awarded ksh.250,000/=. He relied on the case of **Jonah Gatha Kimani =vs= Interfreight (K) Ltd Nairobi H.C.C.C 2675 of 1991** where this court awarded ksh.181,000/= for near similar injuries. The appellant had proposed an award of ksh.10,000/= as adequate compensation. The appellant relied on the case of **Pamela ombiyo Okinda =vs= Kenya Bus Services Ltd Nairobi H.C.C.C 1309 of 2002** where this court awarded ksh.50,000/= for near similar injuries.

The appellant also cited the case of **Simon Mumo Malonza =vs= B.A.T (K) Ltd Nairobi H.C.C.C no. 633 of 2002** in which this case this court made an award of ksh.120,000 for general damages.

6. The question is whether or not the award of kshs.150,000/= is excessive in the circumstances of this case.

7. After considering the nature of injuries and the comparable awards, I am convinced that the learned Senior Resident Magistrate did not commit any error, therefore her award should not be interfered with.

8. In the end, the appeal as against the order apportioning liability in the ratio of 60:40 is set aside and is substituted with an order apportioning liability in the ratio of 50:50. The appeal as against quantum is dismissed.

9. Consequently the award of kshs.150,000 is subjected to 50% apportionment.

10. In the circumstances of this appeal, a fair order on costs is to order that each party to bear its own costs. However the appellant should meet the costs of the suit.

**Dated, Signed and Delivered in open court this 25<sup>th</sup> day of May, 2017.**

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent