



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 311 OF 2005

PAUL KAMANDE MUGO..... APPELLANT

- V E R S U S -

CIRIO DEL MONTE (K) LIMITED.....RESPONDENT

(Being an appeal from judgement of Hon. Muthoni Mburu SRM in Gatundu RMCC no. 1327 of 2004)

JUDGEMENT

1) Paul Kamande Mugo, the appellant herein, filed a compensatory suit against Del Monte (K) Ltd, the respondent for the injuries he suffered while in the course of the employment of the respondent on 12th January 2004. It was alleged that the respondent breached the terms of his contract of employment and of the statutory duty of carte by exposing him to risks enumerated in paragraph 5 of the plaint. The appellant averred that when a water pump was released, the fork lift of a dumper crushed on him thereby causing serious injuries. The respondent filed a defence to deny the appellant's claim. It was stated that the appellant did no breach any contractual nor statutory duty to the respondent. The respondent instead blamed the appellant for being negligent while performing his duties. Hon. Muthoni Mburu, learned senior resident magistrate heard the suit and in the end she dismissed the action in its entirety on the basis that the appellant had failed to prove his case. Being aggrieved, the appellant preferred this appeal.

2) On appeal, the appellant put forward the following grounds;

- 1. That the learned magistrate erred in fact and in law by failing to find that the defendant was 100% liable in the absence of any evidence by the defence to challenge the plaintiff's***
- 2. That the learned magistrate erred in fact and in law by dismissing the plaintiff's case while there was sufficient evidence to make a finding on quantum.***
- 3. That the learned magistrate erred in fact and in law by failing to see and correct a typographical error which led to miscarriage of justice.***
- 4. That the learned magistrate erred in fact by considering a medical opinion as a factual requirement.***
- 5. That the learned magistrate erred in fact and in law by failing to make an award on quantum in the absence of a medical report suggesting that the plaintiff was not injured.***
- 6. That the learned magistrate erred in fact and in law by failing to make a finding on quantum***

based on the plaintiff's evidence who exhibited his injuries and produced treatment notes.

7. That the learned magistrate erred in fact and in law by failing to award the alternative judgement as the main judgment.

8. That the learned magistrate erred in fact and in awarding an alternative judgment on general damages which was inordinately low as to lead to a wrong assessment of damages.

9. That the learned magistrate erred in fact and in law by failing to make an award on special damages despite evidence to the contrary.

10. That the learned magistrate erred in fact and in law by failing to award the plaintiff costs.

3) When the appeal came up for hearing, learned counsels appearing in this appeal recorded a consent order to have the appeal disposed of by written submission. I have re-evaluated the case that was before the trial court. I have further considered the rival written submissions.

4) Though the appellant listed 9 grounds of appeal, those grounds may be argued together in one composite ground that is to say whether or not the appellants had proved he was entitled to an award of damages and how much?

5) The record shows that the appellant tendered the evidence of two witnesses. The respondents closed its case without summoning witnesses. It is the evidence of Paul Kamande Mugo, (PW2) the appellant herein that he was employed by the respondent as a mechanic and that on the material date he together with three other employees were assigned duties of reinstalling a pump. He stated that while they were offloading the pump from the dumper the machine became faulty and the pump slipped and had his left middle ring fingers injured. The appellant claimed that the ground where the machine was operating was very bumpy and should have been levelled. He admitted he was issued with gloves but still he got injured. The appellant summoned doctor Kiama (PW1) who produced a medical report on ten appellant after examining him. In his report PW1 stated that the appellant suffered laceration injury on the right and left index fingers. The learned resident magistrate noted that the appellant had contradicted himself hence it was difficult to make an award on damages. I have also examined the recorded evidence and it is clear that indeed the appellant had contradicted himself. However the evidence of the doctor (PW1) is in agreement with the pleadings i.e. paragraph 6 of the plaint.

6) With respect, I agree with the submissions of the respondent that the appellant had failed to establish his case. He did not plead that he suffered injuries on the middle and ring fingers. There was no credible medical evidence presented to support his evidence. The learned resident magistrate was therefore right to dismiss the appellant's suit.

7) In the end, I find no merit in the appeal. It is dismissed in its entirety with costs to the respondent.

Dated, Signed and Delivered in open court this 20th day of May, 2016

J. K. SERGON

JUDGE

In the presence of:

..... for the Applicant

..... for the Respondent