



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 63 OF 2006

KAKUZI LIMITED.....APPELLANT

VERSUS

STEPHEN NYOIKE WAINAINA.....RESPONDENT

(Being an appeal from the original Conviction and Sentence of the Senior Resident Magistrate's Court at Yatta by Hon. M. Maundu (SRM) in Civil Case No. 106 of 2005 dated 26th April, 2006)

JUDGMENT OF THE COURT

1. The Respondent herein had filed a claim in the trial court against the appellant on 10th June, 2005 claiming special and general damages arising from injury suffered while in the course of employment due to the alleged negligence of the appellant. After trial the court awarded the plaintiff Shs. 100,000/= as general damages and Kshs. 2,000 special damages. The court also apportioned liability at 70%:30% against the appellant for general and special damages and gave costs of the suit to the Respondent.
2. Being dissatisfied with the said judgment the appellant filed this appeal based on the following grounds;
 - a. *By finding that liability be apportioned at 70% to 30% in favour of the Plaintiff, the Senior Resident Magistrate erred in law in that there was no evidence to support such a finding.*
 - b. *The Senior Resident Magistrate erred in law and fact by failing to take into account the evidence of the two defence witnesses whose evidence was credible and sufficient totally disprove the Plaintiff's claim.*
 - c. *The Senior Resident Magistrate grossly misdirected himself by relying solely on the treatment slip produced by the Plaintiff/Respondent when the said treatment slip was not only a photo-stat copy but its contents were wholly disowned by the purported maker hereof.*
 - d. *The Senior Resident Magistrate failed to take into account the fact that the Plaintiff/Respondent did not prove the particulars of negligence as per paragraph 5 of the Plaintiff.*
 - e. *On quantum, the Senior Resident Magistrate erred by assessing general damages at Kshs. 100,000/= which sum is inordinately high as to be an erroneous estimate of damages payable considering the injuries sustained.*

3. The appellant therefore prays that the appeal be allowed and that the said judgment be set aside and the plaintiff's suit be dismissed with costs, and/or that the court do find on the issue of liability and quantum of damages payable. The appellant also prays for costs of this appeal.
4. Parties with the leave of court filed submissions which I have considered. The issues I raise for determination are the same as those raised in the Memorandum of Appeal. This being the first appeal I will review and evaluate the evidence of the trial court so that I may reach an independent decision.
5. The Plaintiff was the sole witness in his case. He testified that he was an employee of the appellant from 1996 to 2004. He was employed as a watchman. This fact was not disputed as **DWI Mathias Muinde Manyau** for the defendant admitted that the plaintiff was their employee. The Plaintiff testified that on the material day he was instructed by his supervisor to go and repulse some attackers at the water tank area within the employer's premises. He was hesitant for he feared for his life, but he eventually obliged. On arrival he faced about seven (7) assailants, who chased him away, and in the process he fell down and sustained the injuries. He was treated at the company's clinic. DW1 and DW2 denied that the plaintiff was injured in the cause of his employment. DW1 testified that whereas the plaintiff was working on the material day as the payroll (DExh.1) for January, 2003 shows, there was however no indication that the plaintiff was injured on that day. The payroll on that day and on the subsequent days was marked "P" meaning the plaintiff was present. If he had been sick, the witness testified that the payroll would have indicated "S". **DW2 Esther Wambua** was a nurse at the defendant's clinic. She testified that she did not treat the plaintiff on the alleged days of the accident. She produced treatment register from the clinic for the month of January, 2003 (D.Exh. 2). DW2 disowned the treatment slip (P.Exh. 1) produced by the plaintiff.
6. The trial court after assessing evidence concluded that the Plaintiff was truthful and believable, and that the documentary evidence of DW1 and DW2 could easily be manipulated by the defendant to escape liability since the documents originated from the defendant. The assessment and conclusion reached by the learned trial magistrate appears credible. He is the person who observed the evidence and this court, not having had the opportunity to observe the demeanor of witness or to hear evidence first hand, cannot doubt the learned magistrate.
7. The learned magistrate also apportioned liability on the grounds that the plaintiff's work made him prone to risks of that nature. In my view, however, the plaintiff should not be blamed.
8. The defendant, by sending the plaintiff alone at night to fight a gang of robbers was explicitly exposing the plaintiff to foreseeable injury. There is evidence that the plaintiff hesitated from accepting those instructions. But it is clear that he had no option, and so he went, only to be chased by a gang of robbers. He fell and suffered the said injuries. The question to ask is this: If on that night the plaintiff restricted himself in his area of operation, and the supervisor did not ask him to take the risk of fighting a seven (7) member gang, would the plaintiff have suffered the said injury? On a balance of probability, the answer is definitely no, so there is no reason to find the plaintiff culpable on that occasion. If there was a counter appeal on this issue by the Respondent, this court would have upheld the same. But since there was no counter appeal the issue remains moot.
9. On assessment of damages, the law is that an appellate court should not interfere with award of damages unless the same is manifestly erroneous, being either too high or too low. I have considered the injuries suffered. I do not think that the appellant has proved on a balance of probability the jurisdiction of this court to interfere with damages awarded by the learned trial magistrate
10. For the foregoing reasons, the appeal herein is dismissed with costs to the Respondent.

That is the judgment of the Court.

DATED, SIGNED AND DELIVERED THIS 25TH DAY OF OCTOBER, 2016

E.K.O. OGOLA

JUDGE

In the presence of;

M/S Njunguna holding brief for Mulwa for appellant

Court Assistant – Mr. Munyao