



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO.117 OF 2011

FRANCIS WANDERA.....APPELLANT

VERSUS

SAMEER AFRICA LIMITED.....RESPONDENT

(Appeal from the original judgment and decree in Milimani Commercial Courts Nairobi,

CMCC No. 8120 of 2007 delivered on 2nd March, 2011 by Hon. Mr. K. L. Kandet (SRM))

JUDGMENT

1. The respondent sued the appellant seeking compensation following an accident which occurred on 22nd February, 2006. The trial court heard the matter and dismissed the suit.

2. Being dissatisfied with the trial court's judgment, the appellant filed this appeal on the following grounds:

“

a. That the Honourable Magistrate erred both in law and in dismissing the appellant's entire suit without regard to the evidence rendered or at all.

b. That the Honourable Magistrate erred in law and in fact by completely holding that the appellant had not proved his case on a balance of probability and or the required standards.

c. That the Honourable Magistrate misdirected himself both in law and in fact by failing to consider the pleadings on record and submissions by both parties.”

3. This being the first appeal, it is my duty to re-evaluate the evidence tendered before the trial court and come to my own independent conclusion taking into account the fact that I did not have the advantage of hearing the witnesses. (See: ***Peter v. Sunday Post (1958) at pg. 429.***)

4. The respondent's case was that on the material day, he had been assigned the duty of lifting material used to manufacture tyres (liner). He had worked the whole day. He stated that he was assigned to do the duty about one and a half (1^{1/2}) hours before official duty hours. He stated that he felt muscle strain as he lifted up the said material. When he reported, he was given a pass to go to hospital. The appellant produced treatment documents and a medical reports to that effect.

5. The defendant on the other hand brought no witness.

6. The appeal was canvassed by way of written submissions. The appellant submitted that the respondent was to be found liable considering that his evidence was uncontroverted. He also urged that he had proved loss for future earnings since he proved that he could not do heavy manual work.

7. The respondent on the other hand contended that the burden of proving that the injury was occasioned as a result of the work done during employment lied with the appellant.

8. What falls for this court's determination is whether the appellant has proved on a balance of probabilities that he suffered the injury while in the course of duty. If the foregoing is answered in the affirmative, the next issue shall be to what extent is the respondent liable and what damages are available to the appellant.

9. The consequences failure to adduce evidence has been vastly considered by this court. in **KaruruMunyoro v. Joseph Ndumia Murage & Another Nyeri HCCC No. 95 of 1988** Makhandia J held:

“The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff’s evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon.”

10. In **Janet Kaphiphe Ouma & Another v. Marie Stopes International(Kenya) HCCC No. 68 of 2007**, Ali-Aroni j, stated:

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Section 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence.”

11. In the absence of evidence in rebuttal from the respondent, it follows therefore that the appellant proved his case on a balance of probability. In my considered opinion, however, in measuring the duty of care, one must balance the risk against the measures necessary to eliminate the risks. The respondent knowing that the work was strenuous ought to have excused himself. He too has to shoulder liability. In the circumstances I apportion liability between the appellant and respondent at the ratio of 50:50.

12. The appellant claimed loss of future earnings. The basis of calculating the loss of future earnings to be paid to the appellant shall be the net salary that he received. There being no evidence as to the net amount he was paid I shall use the minimum of KShs. 2,000/-. I shall consider 20 years as multiplier since the appellant would have worked for another 20 years. The appellant is therefore awarded loss of future earnings as hereunder:

KShs. 2,000/- × 12 × 20 = 480,000/-

13. The appellant suffered injury to the lower back, backstroke and backaches. I have considered the said injuries in relation to authorities to that effect inter alia, **Kemfro Africa t/a Meru Express & Another v. A.M. Lubia & Another (1982-1988) 1 KAR 727**. I hereby make an award of KShs. 200,000/- as general damages.

14. The appellant also pleaded and proved special damages as hereunder:

i. Travelling expenses KShs. 5000/-

ii. Medical report KShs. 2,500/-

15. The amount of damages awarded i.e Ksh. 687,500/= is subject to the liability apportioned above.

Dated, Signed and Delivered in open court this 18th day of December, 2014.

J. K. SERGON

JUDGE

In the presence of:

.....**for the Appellant**

.....**for the Respondent**