



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Appeal 241 of 2010

ISAIAH MUTONYI. APPELLANT

VERSUS

JAMES WAHOME NGARI. RESPONDENT

(From the Judgment and decree of M K Kiema, Resident Magistrate in Milimani CMCC No. 9885 of 2005)

J U D G M E N T

This suit started by a plaint dated 8th November, 2007 filed by the Plaintiff therein, who is the Respondent in this appeal. He sued the Defendant/Appellant for general and special damages arising from injuries suffered by him in the course of his employment in the building industry accident on 29th March, 2007.

The Plaintiff/Respondent was an employee of the Defendant/Appellant as a casual worker paid by the day. On the material day the plaintiff was standing on a trapper of a ladder while doing construction work. The trapper made of wood, broke and the plaintiff fell to the ground and got injured. The building which was being constructed appears to belong to the Defendant/Appellant. The ladder was originally constructed by the Defendant's carpenter. The plaintiff was taken to one or two hospitals by the Defendant's wife. The injuries were originally generally denied in the defendant's defence but admitted by the defence witness, Peter Kingori, DW I.

In his testimony during the hearing of the suit at the lower court, the plaintiff said that he was an employee of the Defendant as a senior foreman. He fell and got injured while on duty, working for the Defendant. He called a doctor who confirmed the injuries he had sustained when he fell. His case as much as this court understands it was that the Defendant had employed him to work in the Defendants plot No. Langata/72/2424 where the Defendant was constructing a block of houses. The trapper of the ladder, which belonged to the Defendant and which had been constructed by the Defendant's carpenter, broke and he fell and sustained injuries. He held the defendant liable for negligence or breach of statutory duty of care that the employer should at all material times, maintain safe working conditions for his workers. That the ladder broke because it was not properly maintained by the Defendant. That the failure to hold and maintain safe working conditions is what caused the breaking of the ladder and it was the direct or indirect cause of the injuries sustained by the plaintiff.

Although the Defendant had generally denied these claims in his defence, he failed to support the denial by actual evidence during the hearing. This was because he did not attend court personally, although his advocate attended and sought for adjournment which was refused. Assuming for a moment that the refusal of adjournment was proper, what the trial court had in its hands at that moment was the

evidence of the plaintiff and his doctor as well as the Defendant's witness who testified as DW I.

I have carefully perused the pleadings, the evidence aforesaid and the written submissions by the plaintiff. As the Defendant failed to file any written submission, I will, as the trial magistrate did, consider and take into account only the evidence and submissions on record. I am satisfied that the Plaintiff adduced sufficient evidence to prove his case on the balance of probabilities. The same was not controverted in any substantial way. It showed that the Defendant had employed the plaintiff for several years. The Plaintiff and other were at the material time working in a site which belonged to the Defendant. They were constructing a building for the Defendant. They were using, among other equipment, ladders belonging to the Defendant who also had them made for him.

The Defendant had a common law and statutory duty of care to maintain the ladder on safe standards. That the ladder's trapper broke, causing the plaintiff to fall and sustain injuries, was prima facie, proof of negligence or breach of the said duties of care, especially since the Defendant failed to controvert the same.

In this court's view, therefore, the trial court was entitled to find for the plaintiff as it did. This court reaches the same conclusions and supports the lower courts judgment on liability, subject to what this court will state below.

The Appellant argued that the lower court refused an adjournment sought by him and therefore allowed the Respondent to obtain the judgment by default. That the lower court accordingly erred in law and that had it allowed an adjournment as sought, the appellant would have called further evidence to effectively controvert the plaintiff evidence.

I have examined the record. I observe that the interlocutory judgment which had been obtained by the plaintiff against the Defendant for failure to file Defence was set aside on 30th July 2008, whereupon a defence was filed by consent with costs to be paid by Defendant by end of the next hearing day. It was followed by a full hearing when plaintiff and his doctor gave evidence. The next hearing was fixed on 19th August, 2008.

On 19th August, 2008 the plaintiff closed his case and the Defendant's advocate called the first defence witness. The Defendant was not in court and he had not paid the throw-away costs imposed on him to get opportunity to file defence. The defendant's advocate was forced to seek adjournment. He got it once again to 25th September, 2008 but once again on condition that he paid costs of Ksh.13,500/- before the next hearing date.

On 25th September, 2008 the Defendant was one more time absent and his advocate sought another adjournment. He got it until 7th October, 2008 and the court made it clear that the same was the last adjournment. The defendant was again to pay adjournment fees of Ksh.1500/- before next hearing date. The earlier outstanding adjournment costs had not been paid and were ordered to be paid before the next hearing date.

On 7th October, 2008, the Defendant was again absent and his advocate sought a further adjournment, which was straineously opposed by the plaintiff, who also drew the attention of the court that all previous adjournment costs had not been paid. This time the trial court refused adjournment and called upon the defence counsel to call his next witness. No witness was present and the Defendant's counsel voluntarily closed his defence case. The court invited both counsel to file written submissions and fixed a mention on 23th October, 2008 when plaintiff's counsel alone attended court. The plaintiff had filed his submissions but the Defendant had according to his usual practice failed to do so. In the circumstances, the trial magistrate reserved the case for judgment, the absence of the Defendant and his counsel, notwithstanding.

The above facts speak for themselves. The trial court gave Defendant sufficient opportunity to defend. The latter clearly abused the court's discretion in his favour. The defendant failed and/or refused

even to pay various adjournment and other costs upon which favourable discretion had been exercised to him. To cry foul and accuse the trial magistrate of error in the exercise of her discretion in these circumstances, is not only hollow and futile but smacks of lack of seriousness and integrity in this appeal. .

I have finally looked at the number and seriousness of the injuries sustained by the Appellant. I find that the level of the general damages awarded is sober and indeed, proper. In the circumstances, this appeal has no merit. It is dismissed with costs. Orders accordingly.

Dated and delivered at Nairobi this 11th day of March 2013.

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D A ONYANCHA
JUDGE