



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT EMBU**

**Civil Appeal 30 of 2005**

**TEBERE CONCRETE CO. LIMITED.....APPELLANT**

**VERSUS**

**SIMON KARIUKI NGUGI .....RESPONDENT**

***(AN APPEAL FROM THE JUDGMENT DELIVERED ON 15<sup>TH</sup> APRIL 2005 BY HON. KIMUTAI K.T. AT WANGURU SENIOR RESIDENT MAGISTRATE'S COURT PMCC NO.30 OF 2004)***

**J U D G M E N T**

The Appellant herein was the Defendant while the Respondent was the Plaintiff in Wanguru SRM's Civil Case No.30 of 2004. His claim was for special and general damages arising from injuries he suffered as he worked for the Appellant.

The learned trial Magistrate heard the parties and witnesses and gave judgment in favour of the Plaintiff in the sum of kshs.57,000/= with interest and costs. The Appellant being aggrieved by the Judgment has filed this appeal raising the following grounds;

1. The learned trial Magistrate erred in law when he admitted exhibits 2 and 3 without proper proof of its admissibility.
2. The learned trial Magistrate further erred in law when he held; *“As to whether prosecution exhibit 1 is a forgery, I find no evidence to find to be so .....”* when the Appellant's witnesses one Doctor Muia disowned the exhibit as being written by him.
3. The learned trial Magistrate erred in law that the Respondent (original Plaintiff) had on balance of probability and the preponderance of evidence proved his case.
4. The award of kshs.53,000/= and special damages of shs.2,000/= were excessive in the circumstances of the evidence.

The Counsels agreed to dispose of the Appeal by way of written submissions which they filed.

M/s Bali Sharma & Balisharma for the Appellant submitted that the Respondent's evidence was not credible as he kept on changing the site of the injury. No negligence was proved. He further said the learned trial Magistrate failed to consider the doctrine "*Valenti non fit injuria*" as the Respondent had worked with the Appellant since 2002 doing the same job. And that there was no contract produced.

Ms Muriithi and Ndonge for the Respondent in their submissions have urged the court to dismiss the Appeal on the grounds that;

- *There is no denial that the Respondent was an employee of the Appellant.*
- *His testimony was that it was his left hand that was injured.*
- *The Appellant never proved it's allegations of forgery.*
- *The Appellant owed the Respondent a duty of care.*

I have perused the Record of Appeal filed herein. Order 42 rule 2 Civil Procedure Rules provides;

*"Where no certified copy of the Decree or Order appealed against is filed with the Memorandum of Appeal, the Appellant shall file such certified copy as soon as possible in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79B of the Act until such certified copy is filed".*

This is an appeal that was filed in 2005. It was admitted on 29/6/2011. The Appellant did not take any step to file a certified copy of the decree.

In the case of **REPUBLIC –VS- DISTRICT COMMISSIONER MACHAKOS C.A. NO.121/92 ON 21/5/21996 (UR)** the Court of Appeal held that if the Record of Appeal does not contain a certified copy of the Decree the appeal is incompetent and there is nothing to withdraw.

And in **CANELAND LTD & OTHERS –VS- DELPHIS BANK LTD CIVIL APPEAL NO.39/99 – on 13/6/2001 (UR)** the Court of Appeal held that if the decree is not certified the appeal is incompetent. It therefore means besides the decree being incorporated it must be certified just as Order 42 rule 2 Civil Procedure Rules provides. Since the Appellant's Record of Appeal does not contain a certified copy of the decree, I find it to be incompetent.

I strike out the Appeal with costs.

**DATED, SIGNED AND DELIVERED AT EMBU THIS 9<sup>TH</sup> DAY OF MAY 2012**

**H.I. ONG'UDI  
JUDGE**

**In the presence of:**

**Mr. Njage for Mr. Mahan for Appellant**

**Njue – C/c**