



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL APPEAL NO. 80 OF 2005**

***(Being an appeal from the Judgment of Hon. A. B. Mong'are, R.M. in Nakuru CMCC No. 1656 of 2004 delivered on 31<sup>st</sup> March, 2005)***

**AMALGAMATED SAWMILLS LIMITED.....**  
**APPELLANT**  
**VERSUS**  
**JOHN KARIUKI GITAU.....**  
**RESPONDENT**

**JUDGMENT**

The Respondent sued the Appellant for -

- (a) *General damages,*
- (b) *Special damages,*
- (c) *Costs and interest of the suit.*

Upon hearing of the suit, the Appellant failed to give evidence, and the case was closed at the end of the Respondent's evidence. The learned Resident Magistrate considered the evidence on record, and apportioned liability at 75:25 in favour of the Plaintiff (*Respondent*) and awarded general damages for pain and suffering in the sum of Kshs 55,000/=, and special damages of Kshs 2,000/= making a sub-total of Ksh 57,000/= less 25% contributory negligence of Ksh 14,250/= and entered judgment for the Respondent in the sum of Ksh 42,750/=.

It is against that judgment that the Appellant has appealed on 13 grounds of appeal, that -

- (1) *the learned magistrate caused a miscarriage of justice by locking out the Appellant from presenting its case after closure of the plaintiff's case.*
- (2) *the learned magistrate erred in law and caused a miscarriage of justice in proceeding ex parte in the afternoon.*
- (3) *the learned magistrate erred in law and misdirected herself in ordering the closure of the defence case in the absence of                      counsel for the Defendant (as she then was).*
- (4) *the learned magistrate erred in law and misdirected herself in ordering the closure of the defence case without giving any or                      any due consideration to the presence of the Appellant's representative in court with the defence witnesses ready to adduce evidence.*

**(5) the learned magistrate erred in law and in fact, or misdirected herself on the law of evidence, in finding that the Plaintiff had proved on a balance of probability that he was at the material time, or at all, employed by the company, despite the Appellant's pleadings to the contrary and despite the Appellant putting the Respondent to the strict proof of the allegation that he was so employed and despite the Respondent failing to adduce documentary evidence of the allegation that the Respondent was employed by the Appellant.**

**(6) the learned magistrate erred in law and in fact, or misdirected herself on the law of evidence, in finding that the Plaintiff had proved on a balance of probability that he was at the material time, or at all, employed by the company.**

**(7) the learned magistrate erred in law and in fact, or misdirected herself on the law of evidence, in finding that the Respondent had proved on a balance of probability that he was injured while in the course of his employment with the Petitioner.**

**(8) the learned magistrate erred in law and in fact, and misdirected herself on the law of evidence, in finding that the Respondent had proved on a balance of probability that he (the Respondent) was injured while in the Appellant's premises.**

**(9) the learned magistrate erred in law and in fact, and misdirected herself on the law of evidence, in finding that the Respondent had proved on a balance of probability his claim against the Appellant.**

**(10) the learned magistrate erred in law and in fact, and misdirected herself on the law of evidence, in finding that the Respondent had proved on a balance of probability his claim against the Appellant.**

**(11) the learned magistrate erred in law and misdirected herself on the evidence in awarding general damages in the sum of Kenya Shillings Fifty Five Thousand.**

**(12) the learned magistrate erred in law and misdirected herself on the evidence in awarding Special Damages of Kenya Shillings Two Thousand.**

**(13) the learned magistrate erred in law and in fact, and misdirected herself on the law of evidence in entering judgment for damages and costs of the suit as against the Appellant.**

and for said reasons, prayed that the appeal be allowed, the judgment of the trial court be set aside and that the Respondent be condemned to pay costs of the appeal and the trial court.

As it is often said, it is the duty of this Court, as the first appellate court to re-examine and re-evaluate the evidence before the lower court and make its own findings, and draw its own conclusions, always taking into account the fact that it did not have the privilege to see and watch the witnesses who testified.

In my view the appeal herein raises three issues -

**(1) whether the learned trial magistrate caused a miscarriage of justice by locking out the Appellant from presenting its case after the closure of the plaintiff's case, and proceeding ex parte,**

**(2) whether the Respondent proved his case,**

**(3) whether the damages awarded were excessive in the circumstances.**

On the first issue the trial proceeded on 6<sup>th</sup> February 2005 when the Respondent testified, and the case was adjourned to 7<sup>th</sup> February 2005 but the hearing did not take place and the matter was adjourned

to 7<sup>th</sup> March 2005 when PW2, Dr. Obed Omuyoma testified, and the Respondent closed his case.

Although the coram shows "**non appearance for Defence**", PW2 was in fact according to the record at p. 15 (*p. 9 of proceedings*), cross-examined by Mr. Matinge who must have been acting for **the** appellant, and had come into court in the course of the testimony of PW2.

The record on the same pages, is marked "**LATER**" - shows that there was nobody for the Defendant, and the defence counsel submitted that the matter be left to the discretion of the court. Although there is a discrepancy as to the time, (*Mr. Juma counsel for the Respondent is recorded to have said "it is 10 minutes past 4.00 p.m., while the court recorded it is 2 minutes to 1.00 p.m.*), the material point is that there was no explanation as where Mr. Matunge (*counsel for the Appellant - who had cross-examined PW2*), had gone to, or why there was no representative of the appellant in court at the time. It was therefore within the trial court's discretion to order the closure of the Defence case. Order XB rule 5 of the former Civil Procedure Rules (*now Order 10 rule 6*), donates to the trial court the discretion to make such order as is just - where only some of the plaintiffs (*or the plaintiff*) attends court.

In this case, as noted already, a Mr. Mutunge had cross-examined PW2 on behalf of the Appellant, and there is no record of why he did not attend court.

The Appellant in any event had opportunity before filing submissions on 14<sup>th</sup> March 2005, to apply to court to set aside the order closing the Defendant's (*Appellant's evidence*). By foregoing that right, the Appellant acquiesced in the court's order, and shows that the Appellant (*despite its defence dated 27<sup>th</sup> August, 2004*) had no credible evidence to rebut the evidence of the Plaintiff/Respondent.

Sections 107 and 108 of the Evidence Act, (*Cap. 80, Laws of Kenya*), lay the burden of proof upon whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, and the burden of proof in a suit or proceeding lies on the person who would fail if no evidence at all were given on either side. And in civil proceedings, Section 112 of the Act states that, the burden of proving or disproving any fact lies upon the person having that particular or special knowledge of a particular fact.

In this case, the Appellant claimed in its defence (*para. 3*) that the Respondent was never its employer. The Respondent testified that he was an employee of the Appellant at all material time. The burden of disproving that claim especially lay with the Appellant. The Appellant failed to disprove the Appellant's evidence by declining to give evidence to buttress its denial that the Respondent was its employee. The Respondent's evidence that it was the Appellant's employee therefore stands, and the Appellant's claim to the contrary is rejected.

Similarly the Appellant's claim that the Respondent was not working for, or at work on the same day, must on the same grounds, be rejected.

The last question is whether the Respondent had proved its claim on the balance of probability. Counsel for the Appellant threw at the Respondent a battery of case law that in the absence of the original treatment card, the evidence of PW2, the Doctor who examined the Respondent was inadequate, that failure to produce such a card is fatal to the Respondent's case.

I do not agree. Whereas there are or may be situations where the production of such a card, may be necessary to show that the injury occurred at a particular time in the course of the employee's work, the non-production of such card is not fatal to the plaintiff's, or in this case, to the Respondent's case. **Firstly**, the Appellant never offered any evidence to rebut the Respondent's claim, that he was an employee of the Appellant, and was injured in the course of his employment. **Secondly**, case law and holdings is no substitute to evidence to support such propositions. I am therefore satisfied that the Respondent proved its case on the balance of probability.

The learned trial magistrate found the Appellant liable to the extent of 75% for the cause of the accident, and 25% contributory negligence on the part of the Respondent. For an appellate court to interfere with this finding, it must be shown that it is based on no evidence, or is a misapprehension of the

evidence or is shown demonstrably to have acted on wrong principles on reaching the finding **(Mwanasokoni vs. Kenya Bus Services, Shalli Bankani & Rashid Hamed [1982-88]1 KAR.**

In this case, it was the Respondent's evidence both in-chief and cross-examination that he was initially employed in the "*testing, cutting and splitting*" section of the Appellant's sawmills. On 17.01.2003 he, along with other employees, was taken from that section to another section (*house*) to load timber, and in the course of holding the timber, some things, (*timber*) slid and fell on his right hand causing injury to his ring and middle fingers causing him to lose one nail. The Respondent named persons with whom he was working with. He was injured, and got treatment at Njoro Health Centre. According to the report by PW2, the Respondent got the following treatment at the Njoro Health Centre -

- ***Tetanus toxoid infection,***
- ***Oral antibiotics,***
- ***Cleaning and dressing of the wound,***
- ***Oral analgesics.***

It is not likely that PW2 a doctor (*who regularly appears in court*), would invent the treatment given to the Respondent if he did not see the treatment card to confirm the treatment given to the Respondent at the said Health Centre. Again this clearly shows that the Respondent had proved his case on the balance of probability.

The last issue was whether the damages were excessive. I note that the Respondent suffered injuries to his right-hand fingers. The doctor testified that the injuries he described as harm had healed well, and there was no permanent disability. Counsel for the Appellant submitted that a sum of Ksh 20,000/= would have been adequate as these were soft tissue injuries. Fingers are first points of contact. We grab and hold things, we greet with them, (*a question of esthetics*), any injury to them apart from causing severe pain (*coming off a nail*) is a matter of serious concern. A figure or an award of Shs 55,000/= is neither too low or too high to demonstrate the application of some wrong principle of law. I would not therefore interfere with it.

In summary therefore, I find and hold, that there was no miscarriage of justice by the trial magistrate's closing the defence of case in the absence of the Defence Counsel, or any representative from the Appellant's Company, the Respondent proved its case on the balance of probability, and the damages awarded not excessive in the circumstances.

For those reasons, the Appellant's appeal dated 29<sup>th</sup> April 2005 is dismissed with costs in this appeal and the lower court. There shall be orders accordingly.

**Dated, delivered and signed at Nakuru this 6<sup>th</sup> day of October 2011**

**M. J. ANYARA EMUKULE**  
**JUDGE**