



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Appeal 950 of 2003**

**SUSAN NYACHI EBETETI..... APPELLANT**

**VERSUS**

**KIJABE LIMITED.....RESPONDENT**

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

Susan Nyachi Ebeteti (hereinafter referred to as the appellant), filed a suit in the Senior Principal Magistrate's Court at Naivasha against Kijabe Limited (hereinafter referred to as the respondent). The appellant who was at the material time an employee of the respondent, sought general and special damages from the respondent, arising from an injury suffered by her in an accident during the course of her employment. The appellant maintained that the injuries were occasioned by the negligence and or breach of statutory duty or breach of contract of employment on the part of the respondent.

The respondent was duly served with summons to enter appearance but did not enter appearance or file a defence. Interlocutory judgment was therefore entered in favour of the appellant and the suit set down for formal proof. During the formal proof the appellant and one Dr. David Kuria testified.

The appellant's evidence was that she was employed by the respondent in 1995 as a general worker. On the material day she was on duty digging, when some earth and debris from a raised ground fell on her and injured her. The raised ground was a result of earth collected when the respondent had earlier dug a dam. The appellant testified that she was pregnant at the time of the accident and miscarried as a result of the injuries suffered during the accident. She produced a hospital treatment card from Naivasha District Hospital which confirmed that she was treated at the hospital on the 16<sup>th</sup> April, 2001.

Dr. David Kuria examined the appellant on the 13<sup>th</sup> May, 2003 for purposes of preparing a medical report. His report which was based on history taken from the appellant, and medical report from the hospital, confirmed that the appellant had had two miscarriages one about a week after the accident. The doctor's prognosis was that there could be a relationship between the injuries suffered by the appellant and the first pregnancy loss. He classified the degree of injuries as grievous harm with no permanent disability apparent.

In his judgment the trial magistrate found that the appellant had failed to prove that she was employed by the respondent as she did not produce any letter of employment or payslip. The trial magistrate further found that the injuries alleged to have been suffered by the appellant were so related to pains and complications encountered by a pregnant woman such that no evidence ought to be adduced to separate

the injuries allegedly suffered on 15<sup>th</sup> April, 2001 with the usual pregnancy ailment. The trial magistrate therefore dismissed the appellant's suit contending that she had failed to prove her claim on a balance of probabilities as required by law.

It is a laid down principle that a court of appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles in reaching the finding. (*Mwangi vs Wambugu 1984 KLR 453*).

In this case, no appearance or defence having been filed the issue of liability was settled in favour of the appellant through the entry of the interlocutory judgment. The appellant was therefore under no obligation to call further evidence on this issue. The task of the court during formal proof was limited to assessing the general damages payable. The trial magistrate had no jurisdiction to reopen the issue of liability which was no longer an issue at that stage. In doing so, the trial magistrate proceeded on wrong principles and misapprehended the law. His finding on the issue of liability must be set aside. Further, the trial magistrate erred in failing to address the issue of quantum of damages.

The judgment of the trial magistrate dismissing the appellant's suit cannot stand. Accordingly I allow this appeal, set aside the judgment of the lower court and remit back the file to the lower court for assessment of general damages.

Those shall be the orders of the court.

**Dated and delivered this 22<sup>nd</sup> day of September, 2008**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Wahome for the appellant

Advocate for respondent served absent