



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 210 OF 2007**

**KAKUZI LIMITED.....APPELLANT**

**V E R S U S**

**JACKLINE WANGARI MUCHIRI.....RESPONDENT**

*(Being an appeal from the judgement of Hon. A. Lorot, delivered on 27<sup>th</sup> February 2007 in Gatundu in SRMCC No. 512 of 2005)*

**JUDGEMENT**

1) Jackline Wangari Muchiri, the respondent herein, filed a suit against Kakuzi Limited, the appellant herein, where she sought to be paid damages on account of injuries that she alleged to have sustained while working at the appellant's employment premises. Vide the respondent's plaint dated 26<sup>th</sup> October 2005, the respondent alleged that on 2<sup>nd</sup> April, 2002 while on duty at Mlima Swara Farm, belonging to the appellant where she was employed as a casual labourer, she was weeding and the panga she was using slipped and cut her right ankle.

2) The appellant filed its defence dated 29<sup>th</sup> November 2005 and denied the respondent's claim. The respondent summoned the evidence of 2 witnesses, while the appellant summoned one witness. The suit was heard on various dates and in the end, Hon. A. Lorot, the learned Resident Magistrate apportioned liability equally, and entered judgement in favour of the respondent and against the appellant in the following terms:

General damages	ksh.80,000/=
Less 50% contribution	ksh.40,000/=
Special damages	ksh. 6,500/=
Total	ksh.46,500/=

3) Being aggrieved by the judgement, the appellant preferred the appeal and raised the following grounds of appeal in its memorandum:

***1. In holding and finding that the defendant was negligent and liable to the extent of 50% the learned resident magistrate erred in both fact and law as there was not sufficient evidence to support such a finding.***

***2. By apportioning liability at 50% to 50% the learned resident magistrate erred in law in that her finding was not based on an accurate analysis of the facts presented to the court by the parties in the case.***

***3. The learned resident magistrate misdirected himself on the issue of quantum when he assessed general damages at ksh.80,000/= which sum is inordinately high that it must be an erroneous estimate of damages payable considering that the plaintiff sustained only a minor soft tissue injury.***

4) The aforementioned grounds may be summarised into two main grounds namely:

*i. Whether or not the trial magistrate erred in law and fact on apportionment of liability.*

*ii. Whether or not the trial magistrate erred in law and fact on his award on general damages.*

5) When the appeal came up for hearing, learned counsels consented to have the appeal disposed of by written submissions. I have re-evaluated the case that was before the trial court. I have also considered the rival submissions.

6) The first ground of appeal touches on the issue of liability. The appellant submits that the medical report cannot constitute proof of employment but merely proof of injury that occurred, and the respondent was to prove that she was an employee of the appellant given that it was DW1's testimony that the respondent was not its employee. The appellant states that the respondent did not call any witness to testify of her employment as well as the sequence of events on the day she was injured. The production of the muster roll by the appellant in evidence to show the names of its employees shifted the burden of proof to the respondent, the appellant states that in the absence of any documentary or oral witness evidence, the respondent's claim must fail.

7) The appellant cited the case of **Isabella Moraa (suing as the legal representative of the estate of Mohammed Jacob Getungi) –vs- Kenya Power & Lighting Company Ltd (2007) eKLR**, where the trial court had dismissed the suit on grounds that the plaintiff had not proved his employment with the defendant. On appeal, the learned judge similarly dismissed the appeal on the strength of the fact that the plaintiff had not been able to prove that he was an employee of the defendant.

8) The respondent submits that the sick sheet and the medical report are enough evidence towards the injury and treatment and the respondent, PW2 testified that she was a casual labourer working for the appellant. The appellant did not contest that the respondent was treated at its clinic. It is therefore highly probable that the respondent got injured at the appellant's site while carrying out her duties and was later referred to the appellant's clinic. The respondent testified that her supervisor by the name of Mr. Murigi was present when she got injured and the appellant never claimed that there was no supervisor in its employment by the name of Mr. Murigi.

9) It is the respondent submission that it is possible that the appellant chose to tender a copy of the master roll which did not contain the respondents name because, DW1 testified that the muster roll produced in court was volume 4 for the year 2002 when the respondent was injured, vol. 1 – 3 were not tendered. The muster roll did not contain employees signatures as alleged by the DW1 on cross-examination. The respondent submits that she was an employee of the appellant and was injured at work and the apportionment of liability should not be faulted.

10) This being the first appellate court, this court is mandated to reconsider and re-evaluate the evidence adduced before the trial court so as to reach its own independent decision. In reaching its decision, this court is required to put in mind the fact that it neither saw nor heard the witnesses who testified before the trial court. This court has to determine whether the respondent established on a balance of probabilities that the appellant was liable for the injuries the respondent sustained. The respondent, PW2 testified that she was an employee of the appellant as a casual labourer and was cut by a panga on the right ankle and that she reported to her supervisor a Mr. Murigi, where she was taken to the appellant's company clinic called Kakuzi Dispensary as per the treatment note PExh 4. Dr. Wangai Kiama (PW1) said he prepared a medical report and relied on the treatment notes as well as physical examination of the respondent to ascertain the nature of the respondent's injuries. PW2, the respondent stated that they were being pushed to finish work under pressure and this caused her cut injury on her ankle while in a rush to finish work.

11) The trial magistrate apportioned liability equally on ground that both were to blame. The appellant did not provide gumboots which would have minimized the impact of the injury from the panga from sliding and cutting her, thereby leading to negligence being apportioned equally. I find it to be in line. This ground of appeal lacks merit and the trial court's order on liability cannot be faulted.

12) The second ground of appeal touches on the issue of quantum of damages. The appellant submits that the award on damages was excessive for similar injuries at the time the judgement was delivered in 2007. The alleged injury is a minor soft tissue injury and catering for inflation, the court should reduce the general damages award to ksh.60,000/= as opposed to the ksh.80,000/= that was awarded.

The appellant cited the case of **James Finlay (K) Limited –vs- Joseph Ombati Nyaga (2017) eKLR** where damages were awarded at ksh.60,000/= for similar injuries as those suffered by the respondent herein.

13) The respondent submits that the trial court's award on damages at the amount of ksh.80,000/= is reasonable given the nature of the injuries sustained by the respondent. The respondent cited the case of **Joel Edwards Odhiambo –vs- Wilson Mboya Opel and another (Nairobi HCCC No. 3295 of 1987)** where the plaintiff was awarded ksh.80,000/= for similar injuries as those of the respondent herein.

14) The assessment of damages by the court is discretionary. The appellate court will only interfere with the award of the trial court when it took into account an irrelevant factor or left out a relevant factor or, that the award is too high or low as to amount to an erroneous estimate or the assessment is based on no evidence. I am convinced that the assessment of damages was well founded and the trial magistrate's finding cannot be disturbed.

15) The 1<sup>st</sup> and 2<sup>nd</sup> grounds of appeal are found not to be meritorious. The appeal is dismissed with costs to the respondent.

Dated, Signed and Delivered in open court this 4<sup>th</sup> day of May, 2018.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondents