



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

**CIVIL APPEAL NO. 321 OF 2007**

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

**VERSUS**

**KYALO MWANZIA.....RESPONDENT**

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

On 10<sup>th</sup> March 2006 in the Senior Resident Magistrate Court, the Respondent herein commenced proceedings against the Appellant seeking special and general damages for injuries sustained on 24<sup>th</sup> January 2006. The Respondent stated that he was performing his duties of uprooting coffee stems at the Appellant premises when he sustained injuries. The Respondent claimed the Appellant was negligent and breached its statutory duty towards its employees.

The Appellant had however, denied the claim of negligence, breach of duty of care and accident. It pleaded in the alternative that the Respondent was negligent in handling his duty thus causing injury to himself.

Each party called witnesses to support their side of the case. The court delivered its judgment on 12<sup>th</sup> April 2007 awarding the Respondent general damages of Kshs.80,000/- and special damages of Kshs.5000/-.

That holding triggered this appeal. In a memorandum of appeal the Appellant advanced three grounds upon which it felt that the judgment of the learned magistrate could be impugned. These are:-

- 1. In holding and finding that the defendant was negligent and liable to the extent of 90% the learned magistrate erred in both facts and law as there was no sufficient evidence to support such a finding.**
- 2. By apportioning liability at 90% to 10% the learned magistrate erred in law in that her finding was not based on an accurate analysis of the evidence presented to the court by the parties in the case.**
- 3. The learned resident magistrate misdirected herself on the issue of quantum when she assessed general damages at Kshs.85, 000/- which sum is inordinately so high that it must be an erroneous estimate of damages payable considering that the plaintiff sustained only minor soft tissue injury.**

Parties agreed to argue the appeal by way of written submissions. The written submissions were subsequently filed and exchanged.

On ground 1 & 2, the Appellant submitted that the trial magistrate relied on conjecture in arriving at her decision. The Appellant complained that no facts were tabled in court to warrant the court to believe the Respondent evidence and to disbelieve the Appellant's evidence which was cogent and factual. The Appellant further submitted that the Respondent did not give any evidence to prove that he was an employee of the Appellant on the material day. It stated that the Respondent ought to have produced documents to show that he indeed worked for the Respondent and such documents should have included a contract of employment whether permanent, casual or seasonal. In the absence of such documents the Respondent ought to have proved to the trial court that oral contract of employment existed.

On ground 3, the Appellant also submitted that the award given to the Respondent was so inordinately high that it must have based on erroneous estimates. The Appellant argued that the Respondent sustained only minor soft tissue injury to his fifth index finger. The Appellant stated that such injury at the time the suit was decided were attracting damages in the region of Kshs.40,000/- to 60,000/-. The Appellant relied on the High court decision in the case of **Johnstone Amany Vs Barack Odhiambo & 2 Others Civil Appeal 47 of 2003.**

In response, the Respondent submitted that the trial magistrate was right when she apportioned liability at 90% to the Appellant and 10% to the Respondent. He stated that he established before the trial court that he was injured on duty on that particular day. He maintains that an employer is under obligation to provide safety gadgets, keep place of work secure and train employee regarding their work. He further submitted that the trial court did not refer to extra ordinary matters and/or conjecture in her observation as alleged by the Appellant. He stated that the court only relied on the facts and evidence that was before it. On ground 3, the Respondent submitted that Kshs.85,000/- was fair compensation that the trial court took into consideration high incident of inflation. The Respondent relied on **Said Salim Majeru Vs Kenya Ports Authority, HCCC No. 517 of 1989, and Kakana Nzioka Vs Bamburi Portland Cement Factory Ltd HCCC No. 557 of 1985.**

I have carefully perused the record including the lower court pleadings and the ruling. I have also perused the written submissions before this court on the face of the grounds of appeal all of which were carefully considered together with all the above mentioned documents. The main issue raised in this appeal is ***whether or not the Trial Magistrate on matters of fact was entitled to arrive at the conclusions she did.***

This being a first appeal, it is the duty of this court to assess and re-evaluate the evidence before the lower court, bearing in mind that this court has neither seen nor heard the witnesses and should, therefore, make allowance for the same. The court must be sure that the findings of facts made by the learned magistrate are based properly on the evidence before her and that she has not acted on wrong principles in reaching her conclusion.

The evidence before the court reveals that the Respondent was involved in an industrial accident and he sustained a crush injury to the left 5<sup>th</sup> index finger. The Respondent stated that he sustained the injury while at work within the Appellant premises. Although the Appellant disputed that the Respondent was an employee or that he sustained injury in the course of his duty, the evidence before the court confirms that indeed he was on duty uprooting coffee. The evidence was supported by the testimony of DW1, Mr. Muinde who was on duty supervising on 24/1/2006 when the Respondent was injured. In cross examination he, stated that the Appellant contracted people to uproot coffee. He stated further that the record of the people who were contracted was in the office. Although the Master Roll produced in court did not contain the name of the Respondent, there was no evidence from the Appellant that his name was not in the list that was not presented in court by the Appellant Company who admitted the existence of such list. From the foregoing it is clear that the Respondent was working for the Appellant when he sustained the injury. Otherwise there was no explanation as to how he could be at the farm from where he was indeed taken for medical treatment. I find that the trial magistrate decision was not only correct but based on proper and sufficient evidence in a very well reasoned out judgment.

On the issue of damages, the Appellant complains that the amount awarded is unreasonably high given that the injuries were minor. I am not persuaded by the Appellant that the damages awards were so

inordinately high as to invite the interference of the Appellate Court. In a claim of damages it is trite that the burden of proof lies on the Appellant to demonstrate that the awarded damages were inordinately high to attract such interference. It has failed to do so. The Appellant must prove that the Respondent was negligent to a certain point to invoke apportionment of liability. Its attack on apportionment found by the trial court is not accordingly based on any evidence.

In conclusion I am satisfied that the learned trial magistrate arrived at the correct decision having taken into consideration the evidence and materials that were before her. Taking the totality of all the evidence, I find no merit in this appeal which is hereby accordingly dismissed with costs to the Respondent. Orders accordingly.

Dated and Delivered at Nairobi this 10<sup>th</sup> day of March, 2015.

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**D A ONYANCHA**

**JUDGE**