



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO 18 OF 1999

WIRE PRODUCTS LIMITEDAPPELLANT

VERSUS

STEPHEN MWANGI KIMUYU.....RESPONDENT

(Appeal from the original decree in Nairobi PMCC No 3252 of 1998 – Matheka, RM - passed on 7th December 1998)

J U D G E M E N T

1. This is an appeal against the decree of the lower court by which the Responded (plaintiff) was awarded KShs 121,500/00 plus costs and interest for work related injuries the Respondent claimed he had suffered. Negligence, breach of contract and breach of statutory duty were alleged against the Appellant.
2. The Respondent's case was pleaded as follows in the plaint filed before the lower court -

“On or about the 22nd day of May 1996 the Plaintiff in the course of his employment in the said factory premises stepped onto barbed wires which had been carelessly and negligently left lying on the floor of the said premises, which wires pierced through his boots and his foot causing him severe injuries, loss and damage.”

Particulars of injuries were plead as -

“(i) Penetrating wound to the left foot.

“(ii) Infection of the left foot.”

3. The Appellant (defendant) entered appearance but did not file defence. Nor was there appearance for it at the hearing.
4. The main ground of appeal is ground 4 in the **amended memorandum of appeal dated 5th April 2000** (the original memo of appeal is dated 22nd January 1999). That ground is rendered thus –

“4. The learned magistrate erred in law and in fact in finding that the Plaintiff had proved his case notwithstanding the fact that the injures alleged by the Plaintiff had not bee proved.”

5. I have considered the submissions of the learned counsel for the Appellant, including the cases cited. There was no appearance for the Respondent at the hearing of the appeal. I have also perused the record of appeal and have read particularly the pleadings, proceedings and judgment of the lower court.

6. I have already set out the Respondent's case as pleaded before the lower court. Let us now look at the evidence tendered in support of that case. The Respondent testified and called one witness, a doctor. Their testimonies were very brief as there was no cross-examination, the Respondent having proceeded *ex parte* in the absence of appearance for the Appellant at the hearing.

7. PW1, the doctor, testified as follows –

“I am Dr Maina Ruga. On 10/06/1997 I examined the Plaintiff. He had been injured in an industrial accident. A piece of metal fell into his left eye. He complained of blurred vision/pain/excessive tears. He had a scar in the cornea of the eye. I wish to produce the (medical) report (I prepared) (Exhibit 1). I was paid KShs 1,500/00 (for the medical report).”

The Respondent testified as follows –

“I am Stephen Mwangi Kimunyu. I am the Plaintiff. I used to work with grinding machines. A piece of metal cut and flew into my eye. I was never given protective glasses. I was injured on (my left) eye. I was taken to *Kenyatta National Hospital*. I was injured on 28/8/1996. This is the card (Exhibit 2) and this is the other one (Exhibit 3). I don't see well with that eye although it is now healed. There is pain. I paid PW1 KShs 1,500/00 (Exhibit 4). I pray for damages, costs and interest.”

8. All the evidence offered in support of the Plaintiff's case, including his own testimony and the medical evidence, was totally at variance with his case as pleaded in his plaint. His pleaded case was that he was injured in the left **foot upon stepping upon barbed wire**. The evidence he tendered before the trial court was that he was injured in the left **eye by a flying piece of metal while grinding**. He never amended his plaint and must be bound by his own pleadings. His case should have been dismissed, notwithstanding that the Appellant never filed defence, and also notwithstanding that the Respondent proceeded *ex parte* at the hearing.

9. I will in the circumstances allow this appeal and set aside the judgment of the lower court. I will substitute therefor an order dismissing the plaintiff's suit with no order as to costs. The Appellant will have costs of this appeal. Those will be the orders of the court.

DATED AND SIGNED AT NAIROBI THIS 8TH DAY OF OCTOBER 2014

H P G WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 10TH DAY OF OCTOBER 2014