



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**CIVIL APPEAL 228 OF 2009**

**AFROFREIGHT FORWARDERS LIMITED .....APPELLANT**

**AND**

**JAMES MWAIWA WAMBUA ..... RESPONDENT**

**(Appeal from the judgment and decree of the High Court of Kenya at Mombasa (Sergon, J) dated  
6<sup>th</sup> March, 2009**

**in**

**HCCC NO. 1 OF 2005)**

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**JUDGMENT OF THE COURT**

**1. JAMES MWAIWA WAMBUA** (respondent) filed a suit before the Senior Resident Magistrate's court at Mombasa on 28<sup>th</sup> August, 2001, seeking for general and special damages of KShs.2,000/ for the injuries he allegedly sustained while working for Afrofreight Forwarders Limited (appellant) on 6<sup>th</sup> September, 2001. The matter was heard before Faith Vanani, Resident Magistrate, who entered judgment for the respondent in the sum of KShs.250,000/- as general damages and KShs.1,500/- as special damages with costs at court rates.

**2.** Being dissatisfied with that judgment, the appellant appealed before the High Court, Mombasa. After re-evaluating the matter, the learned judge (Sergon, J) arrived at a conclusion that the respondent had proved his case that he was employed as a casual by the appellant on the material day. However, the judge interfered with the trial magistrate's findings on liability and apportioned it at 70% to be borne by the appellant while the respondent was liable at 30%.

**3.** This is a second appeal against the judgment of Sergon; J dated 6<sup>th</sup> March, 2009, in Civil Appeal No. 1 of 2005. The appellant has listed eight grounds of appeal although during the hearing of the appeal, Ms Muganda, learned counsel for the appellant, combined and argued all the grounds in two clusters. Firstly, counsel submitted that the respondent failed to provide evidence of employment; he merely made allegations that he was employed as a casual which evidence was contradicted by George Muya (DW 1).

4. Secondly, the appellant was able to show the trial magistrate that the respondent was not an employee through the production of a record which comprised of the list of persons who were employed as casuals on the material day. The appellant's evidence and the closing submissions was that the quantum was not given due consideration by the trial court. The respondents did not attend court during the hearing of the appeal although they were served with the hearing notice.

5. This being a second appeal, only issues of law fall for consideration. The two legal issues we discern from this appeal of whether the respondent proved he was employed as a casual laborer by the appellant on the material day and the issue of the apportionment of liability were adequately addressed by the two courts below. On the issue of whether the respondent adduced evidence to prove employment, the learned trial magistrate who heard and saw the witnesses as they testified posited the following opinion on page 13 of her judgment:

*“What I will determine firstly is whether the plaintiff was at the employment of the defendant on 6/9/2001 or not. The plaintiff has told the court that they were recruited 30 people on that day. He has described how the caustic soda was packed. If at all the plaintiff was not so employed, he would not be able to describe the above. The evidence by the defence is a desperate attempt to disown the plaintiff. The casuals list produced herein is for 5/9/2001 and not the material date. It is not prepared by DW 1. I do not agree with the defence allegation that the same gang that entered the port on 5/9/2001 remained there until 7/9/2001. If this were so, there would be no need to have a port pass for the 6/9/2004 and 7/9/2004 (sic) as the defence would want the court to believe that the gang was not leaving the port on 5/9/2001 and 6/9/2001. The defence evidence is confused and self defeating. The temporary movement control permit produced herein shows that the same is valid up to 18:00 hours of the day of issue only and must be surrendered at the gate on leaving.”*

6. The judgment by the learned trial magistrate on this issue of whether the respondent proved his claim of employment was further re-evaluated by the superior court, and Seron J. concurred with the conclusions by the trial magistrate that the respondent proved he was injured while employed as a casual by the appellant. The defence evidence especially the documentary evidence was dismissed as lacking in credibility. However, on the issue of liability, the learned judge apportioned it between the appellant and respondent at 70% and 30% respectively.

7. This Court cannot disturb the concurrent findings by the two courts below on issues of fact. The learned judge properly re evaluated the evidence and rightly interfered only with the issue of liability which was appropriate in the circumstances of the matter. There are no points of law raised in this appeal arising from the judgment of the superior court.

Accordingly, this appeal lacks merit and it is dismissed with no orders as to costs as the appeal was not defended.

**Dated and delivered at Mombasa this 19<sup>th</sup> day of July, 2012.**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**M. K. KOOME**

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**JUDGE OF APPEAL**

**H. M. OKWENGU**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**