



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

APPEAL NO. 21 OF 2018

(Originally Kisii High Court Civil Appeal No. 127 of 2008)

SANGANYI TEA FACTORY LTD.....APPELLANT

VERSUS

SAMWEL BUNDI ONDIEKI.....RESPONDENT

**An Appeal from the judgment and decree of the Honourable S.R. Wewa (Resident Magistrate) in
Kisii CMCC No. of 2007 dated**

JUDGMENT

1. Sanganyi Tea Factory Ltd (the Appellant lodged a Memorandum of Appeal with the High Court Kisii on 8 August 2008, contending that:

- (1) The Learned trial Magistrate erred in law and fact by holding that the Plaintiff had proved his case on liability against the Appellant on a balance of probabilities.
- (2) The Learned Magistrate erred in law and misdirected herself in holding that occurrence of the accident was proved and that the appellant was 80% liable for the same.
- (3) The Learned Trial Magistrate erred in law and fact by awarding general damages that are so manifestly excessive as to be erroneous in light of the nature of injuries allegedly sustained.
- (4) The Learned Trial Magistrate erred both in law and in fact by not properly considering the evidence on record, the Defendant's submissions and authorities and hence did not write a considered judgment.

2. The Appellant filed its submissions before the High Court on 13 October 2011, while the Respondent filed his submissions on 14 July 2016.

3. On 19 June 2018, the High Court citing lack of jurisdiction transferred the Appeal to this Court and because the parties took no steps to advance the Appeal, the Court issued a Notice to Show Cause on 7 June 2021.

4. On the return date of 28 June 2021, the Court was informed that submissions had been filed and exchanged.

5. The Court indicated that it would deliver judgment on notice.

Role of first appellate Court

6. The role of a first appellate Court was discussed in *Kamau v Mungai* (2006) 1 KLR 150 where it was held that this being the first appeal, it was the duty of the Court.... To re-evaluate the evidence, assess it and reach its own conclusions remembering that it had neither seen nor heard the witnesses and hence making due allowance for that.

7. The Court will keep the interdict in mind.

Incomplete Record of Appeal

8. The Record of Appeal filed by the Appellant lacked several pages. Page 2 of the Respondent's testimony was not included.

9. Similarly, page 2 of the typed judgment was missing.

10. With the incomplete Record, the Court is not in a position to carry the role expected of it on a first appeal.

11. The incomplete Record is not only a sign of lack of diligence on the part of the Appellant's advocate but also a demonstration of lack of interest in ensuring the ends of justice are met.

12. In the same respect, the Court notes that the Appeal had been dismissed on 6 July 2015, but was reinstated upon an application by the Appellant on condition that the Appellant caused it to be listed for hearing within 30 days of 14 December 2016.

13. With the state of the Record, and considering the time the Appeal has been pending, it may not be possible for the Court to administer justice. The Appeal is struck out with no order on costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 9TH DAY OF DECEMBER 2021.

RADIDO STEPHEN, MCIARB

JUDGE

APPEARANCES

FOR APPELLANT WANGAI NYUTHE & CO ADVOCATES

FOR RESPONDENT S.N. NYACHAE & CO. ADVOCATES

COURT ASSISTANT CHRISPO AURA