



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI**

**APPEAL NO 14 OF 2019**

**[FORMERLY MALINDI HIGH COURT CIVIL APPEAL NO 58 OF 2019]**

**GODFREY ADINDA OKELLO.....APPELLANT**

**VS**

**TARMAL WIRE PRODUCTS LIMITED.....RESPONDENT**

*(Appeal from the Judgment of Hon. N.S Lutta, SPM delivered on 25<sup>th</sup> January 2017 in Mariakani SPMCC No. 95 of 2016)*

**JUDGMENT**

1. This appeal was initially filed in the High Court at Mombasa as Civil Appeal No 24 of 20117 and later transferred to Malindi High Court where it was registered as Civil Appeal No 58 of 2019.
2. On 9<sup>th</sup> December 2019, the matter was placed before **Nyakundi J** who determined that the High Court lacked jurisdiction to handle the matter and therefore directed that the appeal be transferred to this Court for directions.
3. In online proceedings held on 24<sup>th</sup> July 2020, Counsel for the parties asked the Court to render judgment on the basis of the record of appeal and written submissions already filed.
4. In a Memorandum of Appeal dated 9<sup>th</sup> February 2017, the Appellant raises the following grounds of appeal:
  - a) That the learned Magistrate erred in both law and fact by failing to find that the Respondent was liable for the accident which occurred on 4<sup>th</sup> October 2015;
  - b) That the learned Magistrate erred in both law and fact by failing to appreciate that the Respondent did not tender any primary evidence and did not file any witness statement to controvert the Appellant's evidence on liability;
  - c) That the learned Magistrate erred in both law and fact by failing to consider the Appellant's written submissions;
  - d) That the learned Magistrate erred in both law and fact by failing to consider and analyse the Appellant's evidence on the particulars of negligence;
  - e) That the learned Magistrate erred in both law and fact by failing to attribute negligence on the part of the Respondent;
  - f) That the learned Magistrate erred in both law and fact by failing to find that the Appellant had proved his case on liability;
  - g) That the learned Magistrate erred in both law and fact by failing to find that the burden in negligence had shifted to the Respondent.
5. Being the first Appellate Court in this appeal, I am required to reconsider and re-evaluate the evidence on record and draw my own conclusions bearing in mind that I have not had a first encounter with the witnesses (see *Kenya Ports Authority v Kuston Kenya Limited [2009] eKLR* and *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co Advocates [2013] eKLR*).
6. At paragraphs 5 and 6 of his plaint filed in the trial court on 22<sup>nd</sup> March 2016, the Appellant stated the following:

***“That on or about 4<sup>th</sup> October 2015, the plaintiff was lawfully and carefully in the course of his employment with the company***

*as a casual labourer while instructed by his supervisor to load iron steel from the truck into the go-down in the process, the sliding gate of the go down pressed his right hand as a direct result whereof the plaintiff sustained serious injury, loss and damage.*

*The Plaintiff avers that the said accident and consequential injuries to him were occasioned by the negligence, recklessness and or carelessness and/or breach of employment on his safety by the Defendant, his authorized servant and or agent as he was not provided with safety gear to enable him to go about his duties.”*

7. The Appellant pleaded the following particulars of negligence, carelessness and/or breach of contract of employment on the part of the Respondent, its authorized servant and/or agent:

- a) Exposing the Appellant to risk of injuries, which they knew or ought to have known;
- b) Failing to give the Appellant any instructions or supervision in the circumstances;
- c) Failing to give the Appellant proper safety apparel in the circumstances and in particular such as gloves, overall, safety boots, helmet and proper supervision;
- d) Failing to provide a proper system of work;
- e) Failing to give adequate warning of the inherent dangers involved in the kind of work assigned to the Appellant;
- f) Permitting the Appellant to work in dangerous conditions;
- g) Permitting the Appellant to work with negligent and careless employees;
- h) Providing a defective gate.

8. The Respondent filed a Defence on 28<sup>th</sup> April 2016, by which it denied that the Appellant was its employee or that the alleged accident ever occurred.

9. While denying negligence on its part, the Respondent pleaded the following particulars of negligence and/or breach of duty on the part of the Appellant:

- a) Failing to take any or sufficient precaution for his own safety;
- b) Exposing himself to the risk of damage or injury which he knew or ought to have known;
- c) Failing to follow the Respondent’s directions and directives;
- d) Failing to move away from the sliding gate.

10. In his witness statement filed in the lower court on 22<sup>nd</sup> March 2016, the Appellant merely reiterated the contents of paragraph 5 of his plaint.

11. When he appeared before the trial court however, the Appellant introduced a new piece of evidence to the effect that he was opening the sliding gate when his right hand got stuck, causing injury to three of his fingers.

12. This appeal turns on the question whether the Respondent’s action or inaction caused the accident in which the Appellant claims to have been injured.

13. As held by **Visram J** (as he then was) in *Statpack Industries v James Mbithi Munyao [2005] eKLR* and **Ibrahim J** (as he then was) in *Treadsetters Tyres Ltd v John Wekesa Wepukhulu [2010] eKLR* in an action of negligence, the burden of establishing a causal link between the plaintiff’s injury and the defendant’s negligence falls upon the plaintiff.

14. In its Defence, the Respondent made general denials and also accused the Appellant of negligence. The Respondent did not however call any witnesses and the Appellant made a big case out of this. I think however that the evidential burden placed on a plaintiff to prove their case does not diminish merely because the defendant fails to call witnesses.

15. In his judgment delivered on 25<sup>th</sup> January 2017, the learned trial Magistrate, **Hon. Nathan S. Lutta, SPM** states the following:

*“I have considered the evidence adduced by both sides in this matter and the submissions made. It is evident that the plaintiff was negligent and was not careful while going about his duties.*

*He was in full control of the sliding gate and he pushed it himself hence the injuries. The defendant cannot be blamed in any way. I find that the plaintiff has not proved his case on a balance of probability.”*

16. In his Memorandum of Appeal, the Appellant raises seven grounds of appeal, all touching on the issue of liability.

17. Looking at the pleadings and evidence on record, I find that the Appellant made extensive accusations of negligence against the Respondent but tendered no evidence to support these accusations. He also did not bother to exonerate himself from the allegations of negligence made against him by the Respondent in its Defence.

18. On the basis of the evidence adduced by the Appellant before the lower court, I agree with the learned trial Magistrate that the Appellant did not prove his case as required.

19. In his Memorandum of Appeal, the Appellant did not raise any issue with the hypothetical assessment of damages rendered by the trial court.

20. The general principle on overturning an award of damages was laid in the well known decision in *Butt v Khan (1982-1988) 1 KAR, 1* as follows:

***“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”***

21. In line with this principle, I find nothing in the award made by the learned trial Magistrate to cause me to interfere.

22. In the ultimate, I find and hold that the Appellant’s appeal is without merit and therefore proceed to dismiss it.

23. In view of the past relationship between the parties, I direct that each party will bear their own costs.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 17<sup>TH</sup> DAY OF SEPTEMBER 2020**

**LINNET NDOLO**

**JUDGE**

**ORDER**

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

**LINNET NDOLO**

**JUDGE**

**Appearance:**

**Miss Osino for the Appellant**

**Miss Ngure for the Respondent**