



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NUMBER 5 OF 2018**

**BETWEEN**

**DANIEL OKAYO ODONGO.....APPELLANT**

**AND**

**COOK N' LITE LTD.....RESPONDENT**

**[An Appeal from the Judgment and decree of Hon. Mr. J. Ombura, SRM, delivered at Mombasa on 19<sup>th</sup> October 2011], in CHIEF MAGISTRATE'S COURT AT MOMBASA CIVIL SUIT NUMBER 750 OF 2009]**

**BETWEEN**

**DANIEL OKAYO ODONGO.....PLAINTIFF**

**VERSUS**

**COOK N' LITE LTD.....DEFENDANT**

***Rika J***

***Court Assistant: Benjamin Kombe***

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***Kanyi J & Company Advocates for the Appellant***

***Abdallah & Murshid Advocates for the Respondent***

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**JUDGMENT**

1. Through his Plaintiff filed at the Trial Court on 27<sup>th</sup> March 2009, the Appellant herein sought Judgment against his Employer, the Respondent herein, for special and general damages arising out of work injury.
2. He alleged he was employed by the Respondent as a Helper. In the course of duty, he was cut on his right finger by iron sheets, while arranging them on a table. He pleaded that the accident and resultant injury, was occasioned by Respondent's negligence.
3. He gave evidence and called one Witness, Dr. Ajoni Adede, who validated the Claimant's assertion that he was injured at work.
4. In its Judgment of 19<sup>th</sup> October 2011, the Learned Trial Court found:-
  - It was not doubted that the Appellant was injured at work, treated and discharged as confirmed by Dr. Adede.
  - In his evidence, the Appellant clearly stated that the Respondent was not to blame, yet in his Plaintiff, he pleaded negligence against the Respondent.
  - He expressly exonerated the Respondent in his evidence.

- Even if the Respondent did not give evidence, it was clear that the Appellant did not blame the Respondent for the workplace accident and injury.
- A Court can only award damages where it is shown that the Defendant was negligent.

5. Consequently the Claim was rejected with costs to the Respondent.

6. The Appellant lodged an Appeal at the High Court Mombasa, registered as Civil Appeal No. 235 of 2011. The Appeal was transferred by the High Court to the E&LRC on 17<sup>th</sup> May 2018, on jurisdictional ground.

7. The Appellant lists 9 Grounds of Appeal: the Trial Court erred in not finding the Appellant to have established his case on a balance of probability; the Trial Court disregarded Appellant's evidence and submissions; extraneous matters were considered by the Trial Court in arriving at its decision; there was an error in holding the Appellant did not establish negligence on the part of the Respondent; the Trial Court erred in not finding Appellant's evidence to have been un-rebutted; general damages assessed by the Trial Court were too low; and the Trial Court erred in awarding costs to the Respondent.

8. Parties agreed on 23<sup>rd</sup> March 2019, to have the Appeal considered on the strength of their written submissions.

**The Court Finds:-**

9. At page 2, line 7 and 8, of the trial proceedings, the Appellant is recorded in his evidence-in-chief, to say:

*“ I do **not** blame the Company for causing me injuries and I pray for damages.”*

10. The first impression one gets from this record is that perhaps, the Appellant said, or meant to say, “ I **do** blame the Company.” One would think, viewed against the Plaintiff, the Appellant's evidence would be in affirmation of his statement blaming the Respondent for the workplace accident and injury.

11. Cross-examined, he states from the very outset:

*“The Company is **not** to blame for the accident.”*

He makes it clear that he was not misquoted in his evidence-in-chief, and there was no error in recording of evidence. Of what value would be evidence from the Respondent, rebutting this sort of evidence from the Appellant? Why would it be necessary for the Respondent to rebut that it was not to blame for the accident and injury occasioned to the Appellant, if the Appellant testified as much? The Ground of Appeal stating that the Trial Court erred by failing to consider the evidence of the Appellant as un-rebutted, is bizarre.

12. Can there be any merit in any of the Grounds of Appeal, if the Respondent was not to blame? The Court does not see any fault with the Judgment of the Trial Court. The Trial Court relied on the evidence adduced by the Appellant, in making its decision. Lengthy Submissions filed by the Appellant's Advocates on Trial and Appeal, cannot be a replacement for the evidence given by the Appellant at the Trial Court. If the Respondent was not to blame, there is no sustainable Claim against the Respondent.

IT IS ORDERED:-

***a) The Appeal is rejected.***

***b) No order on the costs of the Appeal.***

**Dated and delivered at Mombasa this 14<sup>th</sup> day of June 2019.**

**James Rika**

**Judge**