



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CIVIL APPEAL NO. 16 OF 2017

BETWEEN

NICO LUCHELI BULINYA.....APPELLANT

AND

SWALEHE & BROTHERS TRANSPORTERS LIMITED.....RESPONDENT

[Being an Appeal from the Judgment of the Hon. Principal Magistrate, H. Nyakweba, delivered on 14th November 2017, in CMCC No. 961 of 2014 at Mombasa]

BETWEEN

NICO LUCHELI BULINYA.....PLAINTIFF

VERSUS

SWALEHE & BROTHERS TRANSPORTERS LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

B.W. Kenzi & Company Advocates for the Appellant

Respondent in Person

JUDGMENT

1. The Appellant was the Plaintiff in the Civil Suit filed at the Chief Magistrate's Court Mombasa, whose details are shown above.
2. He sued his Employer, the Respondent herein, over work injury he sustained on or about 11th January 2014.
3. The Claim was undefended, but the Appellant still could not persuade the Court to grant Judgment in his favour, for General Damages, Special Damages of Kshs. 2,000, Costs, Interest and any other suitable relief.
4. Dissatisfied, the Appellant filed Appeal based on 10 Grounds, which may be condensed as follows:-
 - The Trial Court erred in questioning the existence of a cause of action, interlocutory Judgment having already been entered.
 - The Trial Court erred in holding that all documents had to be produced.
 - The Trial Court erred in casting aspersion on the character of Appellant's Advocate and by alleging fraud on the part of the Appellant.

- The Trial Court's Judgment was based on conjectures and fanciful speculations.

5. The Respondent did not attend Court at any time, during the process of appeal. The Appellant asked to be allowed, and was allowed to file Submissions, and rely on those Submissions entirely, in prosecuting his Appeal. He confirmed filing of Submissions at the last appearance in Court, on 13th June 2019.

6. He mainly gives a rehash of his grounds of Appeal, in his Submissions. He emphasizes that having obtained default Judgment, the Trial Court's duty was only to assess damages.

7. He relies on:-

- ***Court of Appeal at Mombasa, Civil Appeal No. 16 of 1989, Makala Mailu Mumende v. Nyali Golf & County Club.***
- ***Clever Home Limited v. British Tutorial College (Africa) Limited, E.A. L.R (1975) PP 323.***

8. The holding in these Judicial Authorities is that once Interlocutory Judgment is entered, the Claim is admitted, except for damages.

The Court Finds:-

9. It is correct, as held in the decision of the Court of Appeal above, that once Interlocutory Judgment is entered, the only remaining duty left for the Court is to assess damages.

10. Assessment of damages required the Court to ascertain if the Appellant suffered the injuries pleaded. It required the Court to look at the medical evidence presented by the Appellant.

11. Interlocutory Judgment simply dealt with the issue of negligence and liability. It foreclosed the Respondent from claiming that the Appellant in any way contributed to the circumstances leading to the factory accident, and resultant injury to himself, warranting that liability is shared.

12. The Court of Appeal in the decision cited by the Appellant, did not say, and did not intend, that once there is Interlocutory Judgment, the only duty left for the Court is to grant some amount of damages. There must be an assessment of damages involving examination of medical records. It must be shown that indeed, the Appellant suffered injury, and the degree of such injury, must be known through medical evidence. It does not follow that because negligence and liability are no longer contested items, the Court must mechanically go on and grant the injured Employee some amount of money in damages.

13. The Appellant was given adequate opportunity by the Trial Court, to show his injury to the Trial Court, to enable the Court assess damages.

14. The Trial Court found there were fundamental gaps in the Appellant's treatment notes. The Medical Report by Doctor Ajoni Adede, who initially examined the Appellant was not produced before the Trial Court.

15. The Appellant adjourned hearing severally to enable him call Doctor Adede. He was allowed the last adjournment on 23rd August 2017. He did not call Doctor Adede, but instead called Doctor Stephen Ndegwa, who told the Court, he examined the Appellant on 1st August 2017, the same day the Appellant gave his evidence. Doctor Ndegwa alleged to have relied on Doctor Adede's Report, but did not show Doctor Adede's Report to the Court.

16. The Trial Court was entirely correct in its finding that failure to present medical evidence, meant the injuries sustained by the Appellant had not been proved.

17. There was no basis for assessing, and granting damages, without proof of injury, and degree of injury.

IT IS ORDERED:-

a) The Appeal is rejected.

b) No order on the costs.

Dated and delivered at Mombasa this 30th day of July 2019.

James Rika

Judge