



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT MOMBASA**  
**CIVIL APPEAL NO 16 OF 2018**

**[FORMERLY MOMBASA HIGH COURT CIVIL APPEAL NO 203 OF 2011]**

**LEONARD MUTUA WATHOME.....APPELLANT**

**VS**

**PASTA ENTERPRISES LIMITED.....RESPONDENT**

**(Appeal from the Judgment of Hon. D.M Machage delivered on 6<sup>th</sup> September 2011 in Mariakani SRMCC No 29 of 2010)**

**JUDGMENT**

1. This appeal was initially filed in the High Court at Mombasa as Civil Appeal No 203 of 2011. It was transferred to the Employment and Labour Relations Court pursuant to an order made by **Njoki Mwangi J** on 25<sup>th</sup> July 2018.

2. The appeal arises from the Judgment of **Hon D.M. Machage, SRM** delivered on 6<sup>th</sup> September 2011 by which the Appellant's claim was dismissed.

3. In his Memorandum of Appeal dated 5<sup>th</sup> October 2011, the Appellant raises the following grounds of appeal:

- a. That the learned Magistrate erred in law and fact by failing to take into account the submissions of the Appellant;
- b. That the learned Magistrate erred in law and fact by ignoring the fact that:
  - i. The accident was occasioned as a direct result of the Respondent's employee, servant and/or assign;
  - ii. There was overwhelming evidence that the Appellant was injured in the course of his employment with the Respondent and;
  - iii. The Respondent owed the Appellant a duty of care in law.
- c. That the learned Magistrate erred in law and fact in finding that the Respondent was not liable for the actions of its employee, servant, assign and/or agent;
- d. That the learned Magistrate erred in law and fact in not finding that there was a contract between the parties which led to responsibilities, which fact was not controverted;
- e. That the learned Magistrate erred in law and fact in failing to award judgment to the Appellant;
- f. That the learned Magistrate erred in law in awarding the Respondent costs.

4. This is a first appeal and it is well settled in law that the duty of the first appellate court is to re-evaluate the evidence on record and arrive at its own conclusions, always giving allowance for the fact that it has neither seen nor heard the witnesses first hand (see **Selle v Associated Motors Boat Co. [1986] EA 123** and **Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR**).

5. The Appellant's case, as recorded by the trial court is that he was employed by the Respondent as a turn boy in motor vehicle registration number KBD 119D. On 25<sup>th</sup> August 2009, the Appellant was travelling on the said motor vehicle to Kampala when he was involved in a road traffic accident, which caused a fracture on his 4<sup>th</sup> toe and a dislocation of his 5<sup>th</sup> toe.

6. The appeal was urged by way of written submissions. From the judgment of the trial court, it is evident that the matter was determined on the basis of a finding on causation. In his judgment, the learned trial Magistrate states:

**“The plaintiff failed to connect the cause of accident to the defendant. In all the three paragraphs which referred to the defendant none of which stated the relationship between motor vehicle registration number KBD 119D the driver of that vehicle and the defendant.”**

7. In addressing the issue of causation, in *Statpack Industries v James Munyao*[2005] eKLR, Visram J (as he then was) stated the following:

**“It is trite law that the burden of proof of any fact or allegation is on the Plaintiff. He must prove a causal link between someone's negligence and his injury. The Plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily a result of someone's negligence. An injury per se is not sufficient to hold someone liable for the same.”**

8. The Appellant did not adduce any evidence before the trial court to prove ownership of the motor vehicle and on this basis, the learned Magistrate found no causal link between the Respondent and the accident. I find no fault with the finding by the Magistrate in this regard.

9. Having failed to establish causation, the Appellant's case collapsed at that stage. The Magistrate however went further, as he was required, to give an opinion as to the quantum of damages that would have accrued to the Appellant had he established a causal link between the Respondent and the accident.

10. On the issue of quantum, the question would have been whether the trial court had directed itself properly in law and fact, taking all relevant considerations into account (see *Printing Industries Limited & another v Bank of Baroda* [2017] eKLR). The Court found nothing to warrant interference with the discretion of the learned trial Magistrate on this score.

11. Overall, this appeal fails and is dismissed with costs to the Respondent in this Court and the Court below.

12. It is so ordered.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 26<sup>TH</sup> DAY OF SEPTEMBER 2019**

**LINNET NDOLO**

**JUDGE**

Appearance:

Miss Mango for the Appellant

Mr. Kinyanjui for the Respondent