



REPUBLIC OF KENYA

EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

ELRC APPEAL NO. 3 OF 2018

(Before D. K. N. Marete)

JAMES FINLAY (K) LTD.....APPELLANT

VERSUS

FREDRICK MINUNDA ODONGO.....RESPONDENT

JUDGMENT

This matter is originated by way of a Memorandum of Appeal dated 26th July 2015. It comes out as follows;

- 1. THAT the learned Trial Magistrate erred in law and in fact in failing to make a finding that the Respondent's suit did not disclose a cause of action as the accident was not a reasonably foreseeable one in the entire circumstances of the case.*
- 2. THAT the Learned Trial Magistrate erred in law and in fact in allowing the Respondent's claim which taking into account the entire circumstances of the case was fraudulent.*
- 3. THAT the Learned Trial Magistrate erred in law and in failing to fully analyze the evidence tendered by the Appellant herein and giving undue weight to the Plaintiff's case and least weight to the Defence case.*
- 4. THAT the Learned Trial Magistrate erred in law and in fact in that he totally failed to take into account the Appellant's case.*
- 5. THAT the Learned Trial Magistrate erred in law and in fact in holding the Appellant 80% liable for the said accident when there were no grounds to sustain the finding.*
- 6. THAT the Learned Trial Magistrate exercised wrong principles in awarding damages so widely different from awards given in comparable cases as to be an erroneous estimate of the damages to which the Respondent was entitled.*

The respondent's have not filed any written submissions on the subject. This is despite service.

The appellant questions the veracity of the judgement of the learned magistrate which she deems impugned.

Further, the appellant submits that the learned magistrate overlooked glaring inconsistencies in the plaintiff's testimony in his determination and judgement. He (respondent) failed to prove that he was on duty on the material day, 6th November, 2004 the date of the alleged accident.

The respondent also failed to address the various inconsistencies on his work schedule for November, 2004 where he had only worked for four days. This is despite the overwhelming evidence of the appellant to this extent vide an exhibition of his (respondent's) payslip for the month. Curiously, the respondent choose not to support his claim in evidence.

The appellant sought to rely on the authority of **Amalgamated Sawmills Limited v Lucy Wanjiku Ndungu [2009] eKLR** and **Timsales Limited v Simon Kinyanjui Njenga [2007] eKLR** where it was held that *it was incumbent on the respondent therein to prove his assertion as per section 107 of Evidence Act.*

I have perused the appeal and its accompanying record. I have also re-looked at the proceedings of the lower court, particularly the testimonies of the parties. I cannot agree further with the appellant. The respondent's case is borne and bereft of any conclusive evidence to

warrant a finding in his favour. It is evasive and to say the least, scanty in presentation.

I am therefore inclined to allow the appeal with orders that each party bears their cost of the appeal.

Delivered, dated and signed this 9th day of October, 2018.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Koech instructed by Bett & Company Advocates for the appellant.
2. No appearance for the respondent.