



REPUBLIC OF KENYA
EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CIVIL APPEAL NO. 10 OF 2009

(Before D. K. N. Marete)

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

VERSUS

JOSEPH KIPRUTO ROTICH.....RESPONDENT

JUDGMENT

This is an appeal dated 10th January, 2009. It is set out as follows;

- 1. The learned trial Magistrate erred by arriving at a finding on liability, which was not supported by evidence.*
- 2. That learned trial Magistrate erred in law and fact in basing his finding on irrelevant matters.*
- 3. The Respondent's case was not proved on balance of probability as is required by law.*
- 4. The trial Magistrate should have found that there was no contract of employment and that the Plaintiff was hired by an independent contractor.*
- 5. The learned trial Magistrate's award of damages was inordinately too high and manifestly excessive for the injuries allegedly suffered by the Plaintiff.*
- 6. The learned trial Magistrate erred on all points of fact and law in as far as both liability and award of damages is concerned.*

The Appellant prays for relief and judgment as follows;

- 1. That the decision of the Chief Magistrate on both liability and quantum in Kericho PMCC No.482 of 2003 be set aside and a proper finding be made by this Honourable Court.*
- 2. That this Honourable Court do make such further orders as may be just and expedient.*
- 3. This appeal be allowed with costs.*

The appellant in her written submissions dated 18th January, 2017 reiterates the non contested facts of the case that this matter arises out of an accident involving the respondent on board the appellant's tractor

which rolled occasioning injury to the respondent. This was in the cause of an employment relationship *inter partes*.

The trial court in finding for the respondent apportioned liability at 85:15 against the appellant. This is therefore an appeal against judgement and quantum.

The appellant's case against liability is that in finding that the appellant was to blame for negligence, the respondent did not establish steps he had taken to avoid injury. From his testimony, he did not take reasonable care to safeguard his safety. On this she sought to rely on the authorities of **Stat Pack Industries vs James Mbithi Munyao, Nairobi HCC No. 152 of 2005** where the court observed as follows;

“an employer's duty at common law is to take all reasonable steps to ensure the employee's safety but he cannot baby sit an employee. He is not expected to watch over the employee constantly”

Again, in the authority of **Selle & Another vs Associated Motor Boat Co. Ltd & Another (1968) EA 123** the Court of Appeal provided that;

“A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”

She also sought to rely on the authority of **Sokoro Saw mills Ltd vs Grace Ndutha Ndungu 2006 eKLR** where the award for damages was reduced from Kshs.80,000.00 to Kshs.30,000.00 on the basis that the trial magistrate had taken into account irrelevant factors all left out a relevant matter in such determination of damages. This also took into consideration that an award of damages should not be inordinately too low or too high as not to make sense and be erroneous.

She therefore sought an award of Kshs.30,000.00 in the circumstances of this cause.

The respondent did not file any response or written submissions in support of his case.

In this appeal, the issues for determination are;

1. Whether the respondent proved her case that he was injured due to the negligence of the appellant.
2. The quantum of damages awardable to the respondent for the injuries sustained.

As a court of first appeal, this court is mandated to reconsider and re-evaluate the evidence of the witnesses before the trial magistrate so as to arrive at an independent decision as to whether to uphold the decision of the trial magistrate.

The testimony of the respondent at trial was that he was employed as a plucker on 21st June, 2001 he was allocated the duties of splitting wood using an axe and in the cause of duty got hurt.

The respondent further testified that he sustained a cut on his left hand finger and blames this on lack of provision of hand gloves which would have protected him.

In arriving at the decision and award of quantum, the trial court took into consideration the evidence of the parties. The appellant had ample opportunity to controvert the case of negligence by the appellant but did not go far in so doing. I agree with the evidence of the respondent vis-à-vis that of the appellant and find that the trial court came out well in its analysis and conclusion. I therefore uphold the decision of the lower court.

I am therefore inclined to dismiss the appeal with costs to the respondent.

Delivered, dated and signed this 26th day of April 2017.

D. K. Njagi Marete

JUDGE

Appearances

1. Mr. Kirima holding brief for Kibichiy & Company Advocates for the Appellant.
2. Mr. Meroka instructed by Meroka & Company Advocates for the Respondent