



REPUBLIC OF KENYA
EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

ELRC APPEAL NO. 2 OF 2016

(Before D. K. N. Marete)

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

VERSUS

ROSELINE ATIENO GEORGE.....RESPONDENT

JUDGMENT

This is an appeal dated 6th August, 2007. It is set out as follows;

- 1. That learned trial Magistrate erred in law and fact in failing to hold that the Plaintiff did not prove his case on a balance of probability.*
- 2. The learned trial Magistrate erred in failing to evaluate the evidence tendered judiciously.*
- 3. The learned trial Magistrate erred on all points of fact and law in as far as the award of damages is concerned.*
- 4. The learned Magistrate erred in law in fact in failing to apportion liability judiciously.*
- 5. The learned trial Magistrate's award of damages was inordinately too high and manifestly excessive for the soft tissue injuries allegedly suffered.*
- 6. The learned trial Magistrate erred in law and in fact in failing to dismiss the Plaintiff's case.*
- 7. The learned trial Magistrate erred in law and in fact in disregarding the formidable defence evidence tendered.*

The Appellant prays for relief and judgement as follows;

- 1. That the judgement and decision of the trial Magistrate on liability and quantum in Kericho PMCC No.43 of 2005 be set aside and a proper assessment be made by this Honourable Court.*
- 2. This appeal be allowed with costs.*

The appellant in her written submissions dated 20th July, 2016 raises this appeal against the decree of court as follows;

<i>Liability</i>	<i>100% against the Appellant</i>
<i>General damages</i>	<i>Kshs.40,000.00</i>
<i>Special damages</i>	<i>Kshs.1,500.00</i>
<i>Plus the cost and interest</i>	

It is her further submission that the learned trial magistrate erred in the award of damages which was inordinately so high and manifestly excessive for the injuries suffered and also in respect to respondent's loss of earning capacity.

Again, the learned magistrate erred in the apportionment of liability in that it was the respondent's testimony that she was injured outside the appellant's premises. She relies on the testimony of the respondent on cross-examination as follows;

..., the Plaintiff stated that she had worked in that forest for one year. She also stated that, baboons were always known to chase women on the forest. This is to say if she knew, which she knew as per her own personal admission that baboons always chase women, then why would she go alone as she claims? The upshot of this is, she is lying, she proceeded to say and admitted that the Defendant did not rear baboons.....which is a fact that cannot be disputed.

The appellant in furtherance of her case sought to rely on the common law principle that employers are duty bound to take reasonable steps to ensure the employees safety but this does not necessarily mean baby sitting or watching over them constantly as held in the authority of **Stat Pack Industries vs James Mbithi Munyao, Nairobi HCC No. 152 of 2005.**

The appellant also faulted the award on damages at Kshs.40,000.00. It is her submission that an amount of Kshs.30,000.00 would have been adequate for the injury to the left leg as pleaded by the respondent.

The respondent in her written submission dated 18th July, 2016 reiterates her case against the appeal and in this relies in the authority of **Ossuman Dhahir Mohamed & Another – Vs- Saluro Muhumed Nairobi C.A.C.A NO 30 OF 1997** wherein court observed that;

“ The apportionment of blame represents an exercise of discretion with which the court of Appeal will interfere only when it is clearly wrong, or based on no evidence, or on misapprehension of the evidence or on the application of a wrong principle.”

Here, the court further held that;

“In apportioning blameworthiness regard must be had not only to the causative potency of the acts or omissions of each of the parties but to their relative blameworthiness.”

It is her further submission that the award of Kshs.40,000.00 as general damages for pain, suffering and loss of amenities was appropriate in the circumstances. Again, the medical report adduced in evidence indicated she sustained a wound which healed with a scar.

The respondent sought to rely on the authority of **BUTT – VS- KHAN (1977) 1 KLR** wherein it was held that;

“an appellate court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge (Magistrate) proceeded on the wrong principles or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”

Again, she relied on the authority of **WIYUMIRIRIE SAWMILLS – VS-PAUL KARIUKI**

ELDORET H.C.C.A. No. 110 of 2000 where it was observed as follows;

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 award of general damages is a discretion of a trial court. For an appellate court to interfere with that exercise of discretion, it must be satisfied that either the trial court took into account an irrelevant factor or failed to take into account a relevant factor in assessing the damages, or the damages are so inordinately high or low as to result to a miscarriage of justice.”

In arriving at the decision and award of liability and 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 respondent 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. Miss Kipyego instructed by Kibichiy & Company Advocates for the Appellant.
2. Mr. Meroka instructed by Meroka & Company Advocates for the Respondent.