



REPUBLIC OF KENYA
EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

ELRC APPEAL NO. 9 OF 2016

(Before D. K. N. Marete)

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

VERSUS

KENNEDYY ONYANGO OKETCH.....RESPONDENT

JUDGMENT

This matter was originated by way of Memorandum of Appeal dated 29th September, 2011. It seeks the following finding and orders of court;

- 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 Respondent's case*
- 7. The learned trial Magistrate erred in law and in fact in disregarding the formidable defence evidence tendered.*
- 8. The learned trail Magistrate erred in law and in fact in failing to hold that the Respondent was not injured while on duty.*

The Appellant prays for relief and judgment as follows;

- 1. That the judgement and decision of the trial Magistrate on liability and quantum in Kericho PMCC No.89 of 2004 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 respondent in his written submissions dated 17th January, 2017 opposes the appeal and prays that the same be dismissed for want of merit.

The appellant does not file any written submissions in support of her appeal. He reiterated his case at trial that he was employed by the appellant as a tea plucker. At the material time of the injuries, the issue in dispute, 23rd October, 2002 he was assigned the duty of offloading metal pipes from a truck whereby he slipped and sustained injuries. He testified that he was injured on his left lower leg.

It is the respondent's further testimony that he was treated at Kapkoros Dispensary and there after Kericho District Hospital. He was further examined by Dr. Ajuoga in whose medical report it was confirmed that he had sustained a cut wound on the left leg which had left him with an 8 x 6 cm scar. It is his other case that all this was occasioned by the respondent refusal to issue him with protective gear or even warning of the risks at the new work place.

The appellant sought to rely on the authority of **DAKAWOU TRANSPORTERS – VS- PAUL NZOMO KINGOO NBI CIVIL APPEAL NO. 92 of 2003** where Visram, J. while quoting **WINFIELDS AND JOLOWISZ ON TORT 14TH EDITION at page 213** stated:

“If a worker is injured just because no one has taken the trouble to provide him with an obviously necessary safety device, it is sufficient and generally satisfactory to say the employer has not fulfilled his duty.”

The appellant raises an appeal but fails to bring out a case in support of the same. It would therefore require especial circumstances to sustain this on its mere standing.

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 issue for determination therefore is whether the respondent sufficiently established his case as to warrant the award made at trial. I agree with the findings of the trial magistrate on the basis of the evidence adduced thereon. This is not controverted by the appellant both at trial and now.

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. Miss Ngeno instructed by Sila Munyao & Company Advocates for the Respondent.