



REPUBLIC OF KENYA
EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

ELRC APPEAL NO. 1 OF 2017

(Before D. K. N. Marete)

JAMES MAGAKI NYAKUNDI.....APPELLANT

VERSUS

WILLIAMSON TEA (K) LTD.....RESPONDENT

JUDGMENT

This is an appeal dated 15th June, 2010. It is set out as follows;

- 1. That learned trial Magistrate erred in law and fact in admitting and considering evidence which was extraneous and prejudicial to the Appellant.*
- 2. The learned trial Magistrate erred in Law and fact in failing to consider the plaintiff's evidence in totality hence arrived at a wrong conclusion that the plaintiff had not proved his case to the required standard.*
- 3. The learned trial Magistrate erred in Law and fact in assessing the amount of damages which would have otherwise compensated the plaintiff adequately hence arrived at a figure that was inordinately low in the circumstances.*

The Appellant prays for relief and judgement as follows;

- a. That the lower court judgment be set aside.*
- b. That the judgement be entered for the Appellant against the Respondent on liability at 100% and general damages be assessed in a sum that would reasonably compensate the Appellant adequately.*
- c. That costs of this Appeal be borne by the Respondent*

The appellant in her written submissions dated 14th January, 2016 on ground 1, 2 and 3 submits that whereas the respondent testified on his being injured on 16th July, 2001 while working for the appellant, he manufactured documents and presented them in evidence with a view to defeating justice. The trial court accepted and admitted this in evidence despite objections by the appellant.

The appellant also faults the award of Kshs.300,000.00 damages as being on the lower side. She relies on

the authority of **Wainaina Mwangi vs Attorney General, HCC No.3473 of 1991(Nairobi)** where Mbitio, J. awarded Kshs.480,000.00 for similar injuries on a 40% permanent disability.

The respondent in her written submission dated 23rd August, 2016 reiterate their case and evidence at trial;

It was the appellant's evidence that he was injured on the 16th of Juli, 2001, when he was offloading firewood from a tractor. According to his evidence, the wood hit him on the eye causing him the alleged injuries. He stated that he reported the accident and was treated at the respondent's clinic. He did not produce any treatment notes for 24th July, 2001, from Kericho District Hospital. He did not call any witness to corroborate his evidence.

The respondent's witness testified that indeed an accident occurred on 24th July, 2001. The same occurred while the appellant was splitting firewood at his resident. A wooden splinter struck his eye causing the alleged injuries. They produced to evidence documents that showed the appellant was not involved in an accident on 16th July, 2001, rather on 24th July, 2001, arising from the aforesaid circumstances. Their evidence corroborated that of PEXB-2 treatment notes that showed the appellant received treatment on 24th July, 2001.

..., it was the appellant's duty to prove the occurrence of the alleged accident faced with two versions of the occurrence of the alleged accident, the trial magistrate had no option but to rely on a more believable version which was given by the respondent. The appellant did not make any attempts to prove occurrence. He did not produce any treatment notes for the date of the alleged accident neither did he call witnesses.

It was also incredible to believe that a piece of wood would fall on someone's face and only strike an eye and not bruise the area around it. Nevertheless, the appellant failed to discharge his duty and the suit ought to be dismissed as the court held in the following cases:-

It is his further submission that the suggested award of Kshs.300,000.00 by the trial magistrate in the event of a finding in favour of the appellant would have been sufficient compensation. This was not the case.

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.

A scrutiny of the evidence and respective cases of the parties at trial points out to a case in favour of the respondent. This is because the evidence of the appellant in the lower court did not, on a balance of probabilities or even preponderance of evidence tilt the matter in his favour. This is clearly analysed and spelt out in the judgement of the lower court.

I am therefore inclined to agree with the trial magistrate and 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. Mboga instructed by Mboga G.G & Company Advocates for the Appellant.

2. Miss Mitei holding brief for Owinyi instructed by E.K Owinyi & Company Advocates for the Respondent.