REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 144 OF 2010

TIPSY WOOD PRESERVATION LIMITED.....APPELLANT

-VERSUS-

TOM OTIENO OCHOLA.....RESPONDENT

(Being An appeal from the Judgment and Decree of the Hon. G. Mmasi, Senior Resident Magistrate, delivered on 22 July 2010 in Eldoret CMCC No.780 of 2006)

JUDGMENT

[1] The Respondent herein, **Tom Otieno Ochola**, was the Plaintiff in Eldoret **Chief Magistrate's Civil Case No. 780 of 2006: Tom Otieno Ochola vs. Tipsy Wood Preservation Limited**. He filed that suit against the Appellant claiming general and special damages for injuries suffered by him in the course of work as a painter. It was his contention before the lower court that at all times material to the suit, he was an employee of the Appellant; and that it was an express and/or implied term of the contract of employment that the Appellant would take all reasonable precautions for his safely while engaged upon his work; and not expose him to risk of damage and/or injury which the Appellant knew or ought to have known. It was further the contention of the Respondent that the Appellant was under obligation to provide and maintain adequate means and ways to enable him carry out his work in safety.

[2] It was further the contention of the Respondent before the lower court that, on or about the **2 August 2006,** while lawfully engaged in the ordinary course of his employment with the Appellant, the ladder he was using broke and collapsed, whereupon he fell and sustained severe injuries; and that this accident was due to the breach of statutory duty, negligence and/or recklessness on the part of the Appellant, its servants and/or agents. The particulars of negligence and breach of statutory duty were provided at Paragraph 5 of the Plaint dated **30 August 2006**; while the particulars of injuries sustained by the Respondent, as well as the particulars of special damages were set out in Paragraph 6 thereof.

[3] The Appellant denied the Respondent's claim before the lower court. It denied that the Respondent was its employee; or that he was lawfully engaged in the ordinary course of his employment on **2 August 2006** when the alleged accident took place. Accordingly, the Appellant denied that it was in breach of any statutory duty, or that it was negligent towards the Respondent. In the alternative, the Appellant's contention was that, if any such accident occurred, then the Respondent was solely to blame therefor, or that he substantially contributed to the accident. The Appellant replaced its initial Defence with an Amended Defence filed on **6 March 2008** wherein it expressly denied that the Respondent was its employee.

[4] The suit was heard before the lower court, and, in a Judgment delivered by **Hon. G.A. Mmasi, SRM**, on **22 July 2010**, the lower court was satisfied that the Respondent had proved its case on a balance of probabilities. Hence Judgment was entered for the Respondent on liability in the sum of **Kshs. 150,000/=** as General Damages as well as Special Damages in the sum of **Kshs. 6,050/=;** together with interest and costs, on the basis of which a Decree was issued.

[5] Being aggrieved by that Judgment and Decree, the Appellant lodged this appeal on **10 August 2010** on the following grounds:

> **[a]** That the Learned Trial Magistrate erred both in fact and law in finding the Appellant 100% liable for the accident against the weight of evidence adduced;
>
> **[b]** That the Learned Trial Magistrate erred both in fact and law failing to find that a contract of employment never existed between the Appellant and the Respondent;
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> **[c]** That the Learned Trial Magistrate erred both in fact and law by failing to find that the Appellant cannot be liable for injuries sustained by the Respondent as he was an employee of an independent contractor;

[d] That the Learned Trial Magistrate erred both in law and fact in failing to find that the Appellant did not have any direct control as to how the Respondent went about his duties;

[e] That the Learned Trial Magistrate erred in law and fact in failing to take cognizance of the evidence tendered on behalf of the Appellant during the hearing of the defence case;

[f] That the Learned Trial Magistrate erred in law and in fact in using the wrong principles of law to establish negligence against the Appellant;

[g] That the Learned Trial Magistrate erred both in fact and law by proceeding to pronounce judgment in favour of the Respondent in total disregard of the Appellant's submissions;

[h] That the Learned Trial Magistrate erred both in fact and law in failing to dismiss the Respondent's suit for want of proof.

[6] In the premises, the Appellant prayed that the appeal to be allowed and the Judgment and Decree of the lower court dated **22 July 2010** be substituted with an order dismissing the Respondent's suit with costs; and in the alternative, that the Judgment and Decree be set aside and be substituted with a proper finding by the Court; and that the costs of the appeal be awarded to the Appellant.

[7] The appeal was urged by way of written submissions, which were filed herein on **24 July 2018** and **25 July 2018**, respectively. Learned Counsel for the Appellant argued the 7 grounds on three broad heads; namely, the duty of the Court; whether there was a contract of employment; and liability. On the duty of the Court, it was the submission of Counsel that as the first appellate court, this Court is enjoined to re-evaluate the evidence adduced before the lower court and to review and reverse, if need be, the findings or verdict of the lower court. The case of **Suluenta Kennedy Sita & Another vs. Jeremiah Ruto (suing as legal representative of the Estate of Joyce Jepkemboi [2017] eKLR** was cited in support of the argument.

[8] It was further the submission of Counsel for the Appellant that it is important for the Court to satisfy itself that there existed a contract of employment between the parties herein for purposes of establishing any statutory duties arising therefrom. He urged the Court to note that the Respondent was not directly employed by the Appellant Company; and that he did not produce any contract to that effect; and that he told the lower court that he was working for one **Mr. James Ogutu**, an independent contractor engaged by one **Mr. William Sambu**. Counsel relied on the case of **South Nyanza Sugar Co. Ltd vs. Caleb Onyambu [2010] eKLR** and the definition of a **"contract of service"** and **"employee"** as provided in **Section 2** of the **Employment Act, No. 11 of 2007**.

[9] Regarding the contracted works, it was the submission of Counsel for the Appellant that the independent contractor had been engaged by **Mr. William Sambu**, a director of the Appellant Company; and that the said **Mr. Sambu** did so in his own individual capacity and not in the capacity of director. Accordingly, it was submitted that the Company cannot be held responsible in the circumstances, the yardstick being the case of **Salomon & Co. Ltd vs. Salomon [1897] A.C. 22 HL**. It was therefore the contention of the Appellant that it was wrongly held liable, granted that it is a separate entity from **Mr. William Sambu**, whose house the Respondent was painting at the time.

[10] Lastly, it was the submission of the Appellant that the lower court ought to have faulted the Respondent to some extent for the occurrence; in that it was the Respondent who mounted/erected the ladder and climbed it, and therefore ought to have noticed that it was faulty so as to take necessary precaution. Counsel took issue with the Respondent's admissions before the lower court (at page 18 of the Record of Appeal) that the wooden ladder was rotten and had no support to ensure stability. It was therefore his contention that the Respondent recklessly and negligently exposed himself to an obvious risk which was reasonably foreseeable; and therefore it was erroneous for the lower court to attribute 100% liability to the Appellant.

[11] On behalf of the Respondent, it was submitted that the grounds of appeal raised herein are baseless, for the reason that the issues being raised are new issues that were not part of the initial trial stage, and were therefore not canvassed during the trial before the lower court. It was further submitted by the Respondent's Counsel that the Appellant was at liberty to take out Third Party Proceedings before the lower court but opted not to; and therefore that any allegations being raised now about third parties are not only misplaced but also belated. Counsel relied on **Abok James Odera t/a A.J. Odera & Associates vs. John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR** and **Kenya Ports Authority vs. Kusthon (Kenya) Limited [2009] 2 EA 212** in connection with the duty of a first appellate court.

[12] As correctly submitted by Learned Counsel, it is the duty of this Court, as the first appellate court, to re-evaluate the evidence that was presented before the lower court and make its own conclusions thereon, but always bearing in mind that it has neither seen nor heard the witnesses; a principle that was aptly expressed in **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123,** thus:

> **"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..." (**see also **Kenya Ports Authority vs. Kusthon (Kenya) Limited** (supra)**; Abok James Odera t/a A.J. Odera & Associates vs. John Patrick Machira & Co. Advocates** (supra); and **Suluenta Kennedy Sita & Another vs. Jeremiah Ruto** (supra)

[13] A reconsideration of the evidence adduced before the lower court shows that the Respondent called **Dr. Samuel Aluda**, a medical practitioner in Eldoret, as **PW1**. His evidence was that he examined the Respondent on **9 August 2006** in respect of injuries sustained by him on **2 August 2006** while on duty. He noted that the Respondent had been treated at **Jirani Afya Bora Clinic** as an outpatient and thereafter at **Uasin Gishu District Hospital**. He further testified that the Respondent had suffered the following injuries:

[a] Blunt trauma to scalp and neck;

[b] Blunt trauma to spinal column and especially on lumbar spine;

[c] The right scapula was swollen and tender;

[d] The right elbow was swollen and tender;

[e] Both wrists were swollen and tender with bruises;

PW1 added that the injuries, which were basically soft tissue injuries, were continuing to heal. He produced his Medical Report, and the receipt for **Kshs. 2,000/=** that he was paid therefor, as exhibits before the lower court.

[14] The Respondent testified as **PW2** before the lower court. He testified that he is a painter; and that on **2 August 2006**, he was on duty at the Plaintiff's premises, having been employed for that purpose under the supervision of one **James Ogutu**. He further stated that, at about 12.45 p.m., while he was working, the ladder he was using broke in the middle, thereby causing him to fall down. He sustained injuries for which he was treated at **Jirani Afya Bora Clinic** at a cost of **Kshs. 4,050/=.** He thereafter went to **Uasin Gishu District Hospital** for further medical attention; after which he saw **Dr. Aluda** for purposes of medical examination and report, for which he paid **Dr. Aluda Kshs. 2,000/=.** The Respondent accordingly produced the Treatment Chits and receipt as exhibits before the lower court.

[15] On behalf of the Appellant, evidence was adduced by one of its directors, **Mr. Kenneth Safari Chenje (DW1).** He told the lower court that whereas he did not know the Respondent, **Tom Ocholla**, before the institution of the suit, he knew **James Ogutu**; and that it was within his knowledge that on **2 August 2006**, **James Ogutu** was working for his co-director, **William Sambu,** as an independent contractor. He further told the lower court that the said **James Ogutu** drew his attention to the incident in which one of his workers was injured while painting **Mr. Sambu's** house, but did not inquire to know what exactly happened. **DW1** was categorical that the Respondent was not an employee of the Appellant.

[16] From the foregoing summary of evidence, there appears to be no disputation that, on **2 August 2006**, the Respondent was indeed in the course of his work as a painter when he got involved in an accident in which he was injured. There was no rebuttal of his evidence that the ladder he was using got broken or that he sustained the injuries, particulars whereof were pleaded at Paragraph 6 of the Plaint filed in the lower court matter; namely;

[a] Blunt trauma to scalp and neck;

[b] Blunt trauma to spinal column and especially on lumbar spine;

[c] The right scapula was swollen and tender;

[d] The right elbow was swollen and tender;

[e] Both wrists were swollen and tender with bruises.

[17] There was also credible evidence adduced by **Dr. Aluda,** including the documents exhibited before the lower court, to support the contention of the Respondent that he suffered the aforementioned injuries. Accordingly, there was sufficient basis for the lower court to come to the conclusion that the Respondent was indeed injured as aforementioned on **2 August 2006**. Indeed, **DW1** conceded on behalf of the Appellant that the injury report was made to him, though he did not inquire to know the details as to exactly how the accident occurred.

[18] It is however commonplace that even where there is clear evidence of injury, it is not in every case that liability arises. In **Statpack Industries vs. James Mbithi Munyao [2005] eKLR,** this principle was aptly expressed thus:

> **"It is trite law that the burden of proof of any fact or allegation is on the Plaintiff. He must prove a causal link between someone's negligence and his injury. The Plaintiff must adduce evidence from which on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily as a result of someone's negligence. An injury *per se* is not sufficient to hold someone liable."**

[19] Similarly, in **Purity Wambui Muriithi vs. Highlands Mineral Water Co. Limited [2015] eKLR** the Court of Appeal stressed the importance of credible proof, even where there is clear evidence of an employer/employee relationship, that the employee was not at fault or blameworthy in any way, for the employer to be held 100% liable, as was done herein. It held that:

> **"...as a general rule the employer is liable for any injury or loss that occurs to his employees while at the workplace as a result of the employer's failure to ensure their safety. Does this mean that the employer would always be liable in all circumstances regardless of what caused the accident in question? We do not think so. We say so because where an accident happens due to the employees own negligence it would be unfair to hold the employer liable..."**

[20] Accordingly, having re-evaluated the evidence adduced before the lower court, and considered the grounds of appeal herein and the respective submissions made by Learned Counsel, the key issues that arise for determination in this appeal are:

[a] Whether the Respondent availed proof before the lower court to demonstrate that he was an employee of the Appellant:

[b] Whether the Respondent's injuries were solely attributable to the negligence or breach of statutory duty on the part of the

Appellant.

[a] <u>On Employer-Employee Relationship:</u>

[21] Needless to say that an employment contract is basically a contract of service with an employer for the performance of specific services. According to **Section 2** of the **Employment Act, No. 11 of 2007** of the **Laws of Kenya** an **"employee"** is defined as:

> **"...a person employed for wages or salary and includes an apprentice and an indentured learner."**

On the other hand **"employer"** is defined in the said section of the law to mean:

> **"...any person, or public body or any firm, corporation or company, who or which has entered into a contract of service to employ any individual, and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company."**

[22] What then was the evidence of the Respondent in this regard. Here is what he had to tell the lower court in his evidence in chief:

> **"I recall on 2/8/2006. I was on duty at tipsy wood preservation limited, next to tanning. I had been employed to paint a house I can't recall when I started duties but I had worked for 2 months before I sustained injuries...I have no appointment card we were not being given the same. I was a casual employee the other employees had no employment card...I had a supervisor called James Ogutu..."**

[23] In cross-examination, the Respondent conceded thus:

> **"...James Ogutu was paying me my salary. James Ogutu is the one who assigned me this duty of painting the house James Ogutu told me to paint. We were many painters. I do not know who looked for the painters. Ogutu James looked for me we talked and he gave me the assignment to paint. I was being paid Kshs. 300/= per day. It was being paid every Saturday. I do not have the employment contract. I never negotiated the salary. I found other people being paid the amount. When I filed a suit against defendant I was sacked...Ogutu was the supervisor. I was dealing with Ogutu. I have no employment letter. I do not know whether Ogutu had been given a contract. I do not know if my boss was Ogutu."**

[24] From the foregoing, it is manifest that the Respondent did not sufficiently discharge the onus on him to prove that it was employed by the Appellant. He did not produce any document to show that he was an employee of the Appellant. Whereas it was his contention that theirs was a casual relationship for which no written agreement was made, it is instructive, and it was his unequivocal evidence, that he was engaged by one **James Ogutu** and that he used to receive his daily wages from the said James **Ogutu**. He did not call the said **James Ogutu** as his witness or explain why he was unable to testify on his behalf before the lower court. There was no other evidence to create the critical nexus between the Respondent and the Appellant. **Section 107(1)** of the ***Evidence Act, Chapter 80*** *of the* ***Laws of Kenya,*** is explicit that:

> ***Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***

[25] Similarly, **Sections 109** and **112** of the **Evidence *Act*** provide that:

> ***109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.***
>
> **...**
>
> ***112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.***

[26] Hence, the Learned Trial Magistrate appears not to have given the matter sufficient attention when she held that:

> **"...the court observes that from the evidence of the plaintiff there is no way he can be said to have contributed to the accident and to the injuries he sustained...The court finds that the suit has been proved, on a balance of probability. Judgment is entered for the plaintiff as against the defendant company in the sum of kshs. 6050/= (six thousand and fifty shillings only) as special damages pleaded and proved and kshs. 150,000/= one hundred and fifty thousand shillings only) as general damages for pain and suffering and loss of amenities plus costs of the suit and interest from the date of this judgment."**

[27] Clearly therefore, the Learned Trial Magistrate did not pay sufficient attention to the issued raised by the parties in their pleadings, evidence and submissions before her and therefore did not apply her mind to the critical issue of liability and in particular the critical question as to whether or not the Respondent was an employee of the Appellant; the Appellant having denied, at paragraphs 3, 4, 5 of its Amended Defence, that the Respondent was one of its employees. It particularly asserted, at Paragraphs 5A and 5B of the Amended Defence that the Respondent was an employee of a third party and/or independent contractor and not its employee; and therefore that it was not liable for the Respondent's claim. Similarly, the Appellant, in written submissions filed before the lower court, addressed these very issues at length and cited pertinent authorities which the Learned Trial Magistrate did not give sufficient consideration. The Appellant having taken the

posturing it took, the Learned Trial Magistrate was under obligation to frame the issue for determination and specifically make a finding thereon, which she did not do.

[28] It is further manifest from the record of the lower court that, the issue of the independent contractor having been pleaded in the Amended Defence, the contention by the Respondent's Counsel that the issue was being raised for the first time on appeal is untenable. Indeed the Appellant ventilated that very issue before the lower court vide the evidence of **DW1**, the written submissions and authorities cited before the lower court.

[29] Moreover, having denied any knowledge of the Respondent, the Appellant was under no obligation to take out a Third Party Notice, as suggested by Counsel for the Respondent. Indeed, **Order 1 Rule 15** of the **Civil Procedure Rules** provides that a Third Party Notice is applicable where a defendant claims as against any other person not already a party to the suit that he is entitled to contribution or indemnity or that he is entitled to any relief or remedy relating to or connected with the original subject matter of the suit. The Appellant had no such claim against the said **James Ogutu**; contending instead that the painting job was a private arrangement between one of its directors, **William Sambu**, and the said **James Ogutu**.

[30] Thus, having re-evaluated the evidence adduced before the lower court, I am not satisfied that the Respondent availed proof before the lower court to demonstrate, on a balance of probabilities, that he was an employee of the Appellant as at **2 August 2006** when he got injured in the course of his work as a painter. I would accordingly agree with the conclusion reached by **Musinga, J.** (as he then was) in **South Nyanza Sugar Co. Ltd vs. Caleb Onyambu [2010] eKLR** that:

> **"...where a person who is engaged by an independent contractor suffers an injury in the course of his duty, he cannot sue the principal who engaged the independent contractor. His right of action, if at all, is as against the independent contractor."**

[b] On whether the Respondent's injuries were solely attributable to the negligence or breach of statutory duty on the part of the Appellant.

[31] In his Plaint dated **30 August 2006**, the Respondent had alleged the following particulars of negligence on the part of the Appellant:

[a] Exposing the Plaintiff to a danger that the Defendant knew or ought to have known;

[b] Failing to provide and maintain a safe working environment;

[c] Instructing and or otherwise allowing the Plaintiff to work in a dangerous environment;

[d] Failing to warn the Plaintiff of the likely danger in his duties;

[e] Failing to have any regard as to the safety of the Plaintiff;

[f] Providing and or instructing the Plaintiff to use a defective ladder;

[g] Failing to inspect and repair the ladder;

[h] Allowing and or instructing the Plaintiff to use a rotten ladder;

[i] Failing to provide the Plaintiff with support to ensure that he did not fall on the ground in the event of any accident;

[j] Failing to provide sufficient human or other support for the ladder while the Plaintiff was using it;

[k] Allowing and or instructing the Plaintiff to work from a dangerous height.

[32] In his evidence before the lower court, the Respondent merely stated that he was in the course of his work as a painter on **2 August 2006** when the ladder broke in the middle, whereupon he fell down and sustained injuries. He did not expound on the circumstances in which the ladder broke; or demonstrate that the ladder was rotten as alleged in the Plaint. There was no evidence that he was working from a dangerous height as the height of the wall he was painting was not indicated. More importantly, having found that the Respondent did not offer proof before the lower court that he was employed by the Appellant, there was no basis for the finding by the lower court attributing liability at 100% on the part of the Appellant.

[c] A Comment on the Damages payable

[33] In awarding the Respondent **Kshs. 150,000/=** as General Damages, the Learned Trial Magistrate took into consideration the case of **Imco Engineering and Building Contractors Limited vs. Joseph Macharia Karanja, Nakuru High Court Civil Appeal No. 232 of 2001,** whose facts were more or less similar to the facts of the instance case. In that case, the Respondent fell down from a wall as he was working for the appellant and fractured his right leg at the ankle joint. He also sustained soft tissue injuries. He was expected to fully heal with time. The lower court awarded **Kshs. 300,000/=** which was reduced on appeal to **Kshs.160,000/=** in a decision delivered on **3 June 2005**. The Respondent had also relied on other authorities involving comparable injuries in which awards were made ranging from **Kshs. 250,000/=** to **Kshs. 450,000/=** by way of General Damages.

[34] Counsel for the Appellant was however of the view that an amount of **Kshs. 30,000/=** would do. He relied on **Nairobi HCCC No. 4691 of 1987: Michael Ingusi vs. Synthetic Fibres (K) Limited** and **Mombasa HCCC No. 253 of 1987: Mwamburi Kilao Ngama vs. Salim Mahrus** in which awards were made in the **Kshs. 15,000/=** and **Kshs. 30,000/=**, respectively, for comparable injuries.

[35] Needless to say that assessment of damages is at the discretion of the trial court and that an appellate court can only interfere if it is shown that the court acted on wrong principles, or that it awarded so excessive or so little damages that no reasonable court would allow it; or that the court took into consideration matters that it ought not to have taken into consideration or failed to consider matters that it ought to have considered, and as a result arrived at the wrong decision. In **Butt vs. Khan [1981 KLR 349** the court expressed this principle thus:

> **"An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on 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..."**

[36] Hence, considering that the awards relied on by Counsel for the Appellant were made in **1989** and **1990**, over 10 years prior to the decision of the lower court, I would have found no reason to interfere with the award made by the Learned Trial Magistrate.

[37] In the result, and for the reasons aforestated, it is my finding that the appeal has merit. The same is hereby allowed and the Judgment and Decree of the lower court are hereby set aside and replaced with an order dismissing the Respondent's suit against the Appellant in **Eldoret CMCC No. 780 of 2006.** Granted my finding herein above that the Respondent was indeed injured while at work, I would order that each party shall bear own costs of both the lower court proceedings and this appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 15TH DAY OF AUGUST, 2018

OLGA SEWE

JUDGE