

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 45 OF 2017

ALLIED WHARFAGE LIMITED.....APPELLANT

-VERSUS-

GANJA MAVUMBA NYAWA.....RESPONDENT

(Being an appeal from the Judgment of the Honourable Senior Resident Magistrate Hon.A.S.LESOOTIA delivered on 3th February,2017 in Mombasa SRMCC No.2936 of 2010,Ganja Mwavumba Nyawa Vrs Allied Warfage Limited)

JUDGMENT

1.The Respondent, GANJA MAVUMBA NYAWA, instituted a suit against the Appellant, ALLIED WHARFAGE LIMITED claiming for General damages, Special damages, costs and interest.

2.The Respondent averred that on or about the 12thJanuary,2010,he was on duty in the course of his employment with the appellant as a casual labourer when two bags of maize broke off from a high stake and fell on him as he was loading 50Kgs bags of maize onto a lorry at the appellant's Changamwe premises. He stated that he suffered severe bodily injuries as a result of the said accident for which he blamed the Appellant as particularized at paragraph5 of the plaint.

3.The Appellant, who was the defendant, filed its defence dated 9.12.2010 on 10.12.2010,in which he denied the respondent's allegations at paragraphs 1,3,4,5,6 and 8 of the plaint. It averred that if any accident occurred on the alleged date, then the same was not within their knowledge and put the Respondent to strict proof thereof.

4.At the close of the pleadings, the matter proceeded for hearing with each party calling evidence in support of their case. Upon considering the pleadings, evidence and exhibits produced by either party, the trial Magistrate, Hon. A. S. Lesootia (SRM) in a Judgment delivered on 3rd February, 2217, found that the Appellant was wholly liable for the injuries sustained by the Respondent in the cause of his work at the Respondent's premises and awarded the Respondent Kshs.100,000/= General Damages in respect thereof, and Kshs.5,000/= in respect of special damages ,all totaling a sum of Kshs.105,000/=.

5. Aggrieved by this judgment and decree, the Appellant filed the appeal herein vide a Memorandum of Appeal dated 16.8.2017,from which the grounds of appeal may be summarized as follow;

i.The learned magistrate erred in law and in fact in failing to take into account and or in disregarding the Appellant's defence, third party proceedings, evidence and submissions.

ii.The learned magistrate misdirected himself in law and in fact in arriving at the finding that the third party was non-existent despite the overwhelming evidence to the contrary and despite the regular default judgment against the third party or without any basis at all.

iii. The learned magistrate erred in law and in fact by wrongly evaluating the evidence on record and thereby arriving at a wrong conclusion that the Appellant was wholly liable for the accident in total disregard to the Respondent's own evidence.

iv.The learned magistrate erred in law and in fact by failing to consider the oral and documentary evidence tendered by the Appellant and in failing to find that the Respondent had failed to discharge the burden of proof which burden of proof never shifts and therefore did not shift to the Appellant.

v.The learned magistrate erred in law and in fact when he failed to consider properly the parties' submissions on quantum and the cases cited for comparable injuries to those sustained by the Respondent thereby awarding the Respondent an award that was excessive and does not reflect the injuries sustained by the Respondent.

vi.The learned magistrate's judgment is unreasonable and unjustified.

6. The appeal was admitted for hearing on 2.8.2019 and parties directed to file written submissions on 2.10.2019,which they highlighted on15.10.2019.

Appellant's submissions

7.It is submitted that the trial magistrate misdirected himself in finding that the Respondent was its employee despite the fact that such facts were expressly denied by the Appellant. On the second ground of appeal, the appellant submits that the learned trial magistrate erred in finding the third party was non-existence for the reasons that; there existed a staff outsourcing agreement dated 16/3/2009 between the Appellant and the ITA Marine services Limited and that the Respondent's claim for injury occurred at the time when the agreement was in

force. Nonetheless, the Appellant enjoined ITA Marine services Limited as a third party to the suit and obtained a default judgment against it which to date remains in force. It is the Appellant's submissions that the trial Magistrate completely ignored the impact of the third party proceedings contrary to provisions of Order 1 Rule 17 of the Civil Procedure Rules, 2010. This argument was buttressed by excerpts from the cases of Mount Elgon Hardware Ltd-vs-United Millers CA (KSM) 19 of 1996 as cited in Eastern Produce (K) Limited –vs- Christopher Astiado Osiro (2006) eKLR and Imani A. Yuman –vs- Amina Ahmed Abdullah & Another [2012]eKLR.

8. For grounds 3, 4 and 6, the Appellant submits under one head that the learned magistrate wrongly shifted the burden of proof to the Appellant. It is the Appellant's submissions that the Appellant did not adduce any evidence apart from oral testimony to prove that he was employed by the Appellant and was injured at the Appellant's premises. The Respondent testified that he had worked for the Appellant for a period of three years which according to the Appellant transformed to a term contract of employment by virtue of section 37 of the Employment Act yet to contract of service was produced to prove the employment terms.

9. The Appellant submits that the Claimant/Respondent failed to prove his case to the required standard of prove under the Evidence Act Cap 80 Laws of Kenya. The Respondent testified that fell because the sack was placed negligently by a fellow employee. According to the Appellant, it is those employees to blame and therefore negligence on its part was not proved. To support the argument, reliance is placed on the cases of Eastern Produce (K) Limited –vs- Christopher Astiado Osiro (Supra), Treasetters Tyres Ltd—vs-John Wekesa Wepukhulu [2010] eKLR and Morgan –vs- Sim (1857) 11, MOOO P.C 307.

Respondent's

Submissions

10. It is submitted that the appeal is incomplete and incompetent because it does not contain the trial court's exhibit memo and the fact the record of appeal contains two copies of judgment creates confusion prejudice to the Respondent. The Respondent is of the view that the appeal should be dismissed on that ground perse. Nonetheless, the Respondent submitted on the grounds of appeal as follows.

11. On the first ground of appeal the Respondent submits that the trial magistrate considered all the facts and evidence tendered at trial centrally to the allegations by the Appellant. According to the Respondent the trial magistrate considered the Appellant's defence, submission and the third party proceedings but disagreed with the same.

12. On the second ground of appeal; the Respondent submits that the trial magistrate did not misdirect himself in law on the issue of the existence of the third party because there was interlocutory judgment against the third party and it was not an issue at the time of writing the Judgment. It is averred that the appellant did not produce any document to show the incorporation of the third party leave along the fact that the Appellant was unable to effect personal service to the third party hence creating an impression that it is nonexistence. Besides the agreement for outsourcing services, it is submitted that no other document has been produced to show any dealings between the Appellant and the third part.

13. On the third and fourth grounds, it is submitted that the Respondent sufficiently proved the particulars of negligence against the Appellant and the trial magistrate correctly evaluated the evidence to reach a conclusion that the Appellant was 100% liable. The Respondent submits that he sufficiently discharged his burden of proof.

14. Lastly, on the fifth and sixth grounds, it is submitted that the trial magistrate made fair assessment on damages and no reasons have been advanced to brand the judgment as unreasonable and unjustified.

Analysis

and

Determination

15. This court as a first appellate court has a duty to re-examine and re-evaluate the evidence and material tendered before the subordinate court and reach its own independent conclusion. However, the court must bear in mind that since it has not seen or heard the witnesses so as to be able to ascertain their credibility it should exercise caution before interfering with the decision of the trial court. (See *Selle Vs. Associated Motor Boat Company Limited*[1968]EA 123 and *Williamson Diamonds Ltd Vs Brown*[1970]EA 1)

16. Being guided by afore mentioned cases, this court has considered the appeal, the pleadings, the evidence and the submissions together with the cited statute and case law by the parties herein and it is my view that the issues arising for determination are:

- i. Whether the Respondent was an employee of the Appellant
- ii Whether the outsourcing of employees was proved;
- iii Whether the trial court disregarded the interlocutory judgment against the third party by holding the appellant wholly liable.
- iv. The quantum payable to the Respondent
- v. Who should bear the costs of the appeal

17. I will however begin by answering an issue raised by the Respondent that the appeal is incompetent for the fact the record of appeal not only bears two judgments but also lacks the trial court's exhibit memo to enable this court evaluate the evidence extensively. In perusing the court record, I noted that the lower court file is attached as part of the documents to be considered in this appeal. Therefore, in my view dismissing the appeal on the reasons above would amount to a technicality considering that this court can make reference the true copy of lower court's proceedings as annexed to the appeal. I will therefore proceed to consider the appeal on its substance.

18. On the first issue for determination, the onus of proving employment under a contract of service lies with the person who alleges that he was so employed. Under section 2 of the Employment Act an employee has been defined as:

“A person employed for wages or salary and includes an apprentice and indentured learner.”

19. At common law an employee is one who:

- (a) is required to comply with the employer's instruction about when, where and how he or she must work.

- (b) has been trained by the employer to gain experience for purposes of working for the employer.
- (c) has been integrated into the business operations of the employer so that he is subject to the direction and control of the employer.
- (d) must render services personally
- (e) has assistants hired, supervised and paid by the employer
- (f) has worked continuously for a long time
- (g) has specific working hours set by the employer
- (h) is working substantially full-time for an employer and is not free to work for other employers
- (i) performs work on the employers premises
- (j) is required to submit regular oral or written report to the employer
- (k) has his business trips or travel expenses paid for by the employer
- (l) has tools, material and other requirements met by the employer
- (m) is easily dismissed at the will of the employer
- (n) has the right to terminate his contract without incurring any liability.

20. First, the Respondent needed to prove that he was, at all material times, an employee of the Appellant Company. He needed to bear in mind that his assertion that he worked for the Appellant was denied by the latter and that he was put to strict proof thereof. According to the Respondent, he was engaged as a casual labourer with the Appellant and engaged in loading and offloading of sacks at the Appellant's godown when as he was placing a sack on a colleague, other sacks were released from a raised stack by the negligence of his colleagues and they fell on him, causing him to fall down and was injured on the waist and back.

21. For this reason, the burden of proving that the Appellant owed the Respondent any duty of care remained solely in the hands of the Respondent himself. In any case, the cardinal principle of law is that "he who alleges must prove." The same is well captured in Sections 107 to 109 of the Evidence Act which provide as follows:-

"107. (1) 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."

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

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."

22. This law clearly demonstrates the fact that the Appellant not having tendered any evidence, did not make the Respondent's burden of proving that he was an employee of the Appellant Company any lighter. It was still incumbent on him (Respondent) to call evidence in support of his assertion.

23. The Respondent averred that he had worked for the Appellant for a long time and that the nature of his services was on constant daily wages. However, a careful consideration of the evidence that was adduced to support the testimony of Respondent, I find that the Respondent failed to prove on a balance of probability that he was an employee of the Appellant as alleged by him, a fact that the trial magistrate erred in. He neither provided oral or documentary evidence to support his claim.

24. Having regard to the above observation, I also note that, the Respondent having failed to prove that he was working for Appellant Company, the issue of not being provided with protective gear or the Appellant having failed to exercise a standard of care over him, could not arise. A court cannot assume a non-existent fact. It arrives on its findings upon evaluating the facts and evidence presented before it. In my view, I agree with the counsel for the Appellant that the Respondent failed in this test and could not thus successfully prove that the Appellant was liable for his injuries.

25. The Respondent ought to have sought the assistance of the court if needed be to compel Appellant to allow the Respondent to access their duty register to prove that he indeed worked for the Appellant company as he alleged. In the alternative, the Respondent should have opted to call a fellow employee to ascertain that he was indeed the Appellant's employee.

26. It is for this reason that I find that since the Respondent failed to prove he worked for the Appellant Company, he could not claim that the Appellant was negligent in causing the injuries he sustained. Neither could there be nexus between the Respondent and the third party for the outsourcing contract to be considered.

27. In the end, I find that the Respondent failed to prove his case to the required standard, that is on a balance of probability and therefore, the trial magistrate erred in finding in his favour.

28. For the above reasons, the appeal must succeed and the decision of the trial court embodied in the Judgment delivered on 3rd February, 2017 is hereby set aside, and in its place substituted an order dismissing the Respondent's claim with costs to the appellant.

29. The Appellant is awarded the costs of this appeal.
It is so ordered.

Dated, delivered and signed this 20th Day of May, 2020.

D.O

CHEPKWONY.

JUDGE

In view of the declaration of measures restricting court operations due to the COVID-19 pandemics, and in light of the directions issued by His Lordship, the Chief Justice, on 15th March 2020. This ruling/judgment has been delivered to the parties online with their consent. They have waived compliance with Order 21 rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159 (2) (d) of the Constitution which requires the court to eschew technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 18 of the Civil Procedure Act, Cap 21, Laws of Kenya, which impose on this court the duty to use, inter alia, suitable technology to enhance the overriding objective, which is to facilitate just, expeditious proportionate and affordable resolution of civil disputes