



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CORAM: A.K NDUNG'U J**

**CIVIL APPEAL NO. 253 OF 2014**

**SAMUEL WAMBUGU MWANGI.....APPELLANT**

**VERSUS**

**BAKPHARM LIMITED.....RESPONDENT**

*(Being an appeal from the Judgment of Hon. R.A Oganyo (Mrs.) SRM dated and*

*delivered on 27<sup>th</sup> May, 2014 at Milimani Commercial Courts Nairobi*

*in CMCC No. 2898 of 2006)*

**JUDGEMENT**

1. This appeal arises from the decision of the Senior Principal Magistrate in Civil Case No. 2898 of 2006 at Milimani Chief Magistrate's Court.
2. The plaintiff's case in that suit was that he was an employee of the defendant and while in such employment and at his place of work on the 2/5/2003; he sustained injuries when expired spray cans exploded. He claimed damages as a result.
3. In a judgement dated 27/5/2014, the trial magistrate dismissed the claim with costs.
4. In dismissing the suit the trial court stated;

*“The plaintiff in the plaint avers that there was a contract of employment between him and the defendant. In his list of documents, the second document is a staff identity card which I have considered to make a finding whether the plaintiff has proved his employment relationship with the defendant herein. The staff identity card is issued by **TOPEN AGENCIES PLASTIC AND SOLE DEALERS**.*

*The plaintiff's designation therein is given as Agent. The date of issue at the back of the Card is given as 1<sup>st</sup> August 2002. The plaintiff has not shown this court how **Topen Agencies** is related to the defendant limited liability company” See page 71 of the Record of appeal. Further learned counsel submit that the plaintiff has confirmed he was a casual labourer to the defendant but has gone ahead to say how the relationship came about.”*

5. The court then concluded at Page 3 of the Judgement that;

*“The defence submitted that is only in his statement that the plaintiff alludes that he got employed by the in April, 2003 where as the document he relies on shows a different company as having employed him on 1<sup>st</sup> August, 2002. No evidence is adduced as to when the plaintiff ceased to work for **TOPEN AGENCIES** and got employed Bakpharm Limited. I am in the agreement and I find that the plaintiff has not established on a balance of probabilities that he was an employee of the defendant company.”*

6. Aggrieved by this finding, the appellant lodged this appeal basing it on 8 grounds as seen in the memorandum of appeal dated 25/6/2014 and filed in court on the 27/6/2014.

7. The appeal was canvassed by way of written submissions.

8. I have had the occasion to consider the memorandum of appeal and the respective submissions by the parties. I have had due regard to the record of the trial court.

9. This being a first appeal, I am alive to the requirement to re-evaluate the evidence and reach my own conclusions thereon. This is as held in the case of **Selle –vs- Associated Motor Boat Co. Ltd [1968]EA 123** where the court stated;

*“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of appeal acts are that the 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. In particular the court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed in some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”*

10. The appellant’s evidence at trial is captured in his witness statement dated 27/8/2013 upon which he was cross examined. In his evidence, the appellant maintained that he was an employee of the defendant having been engaged by the defendant as a casual labourer in April 2003.

11. He added that on 2/5/2013 he was at work when a fire broke out and since the door to the yard in which he and others were working was closed, he was unable to escape and he was severely burnt. He blamed the defendant for failure to provide a safe working environment, protective devices and fire extinguishers within the yard.

12. He produced in evidence a staff identity card. A reading of the card shows that it was issued by TOPEN AGENCIES. His designation is indicated as **“Agent”**. The card is indicated as having been issued on 1/8/2002.

13. On cross examination, the appellant stated that he was a casual labourer at Mwaliro’s place in Kombo Munyiri road. They used to do several jobs. They could deal with old shoe soles. He had a staff ID Card from TOPEN industries where they (sic) did plastic soles work. On the material day, one James took him to a gate to get a job inside. An Askari gave him a job. On other days, that Askari had paid him whenever he worked for him.

14. On their part, the defendant’s evidence is found in the witness statement of Rajnikant Shah and his cross examination on the same. In a nutshell, he stated that the appellant was never an employee of the respondent. On the material day the appellant in company of others had entered the defendant’s waste material yard where they were collecting waste cans. They were trespassers.

15. On cross examination he stated that one of the directors of the defendant was charged in court and convicted for not taking safety measures hence causing the fire.

16. From the rival evidence on record, this claim turned on the question whether the appellant was an employee of the defendant.

17. **Section 107(1) of the Evidence Act, Cap 80 Laws of Kenya** provides that;

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

18. This is called the legal burden of proof. In our instant suit, the initial burden of proof to show that the appellant was an employee of the defendant lay on the appellant.

19. In what amounts to a clear demonstration of a casual approach to the evidence relating to the alleged employment of the appellant by the defendant, the appellant provides in support of his case a document issued by a firm known as TOPEN AGENCIES which is a staff ID card showing that the appellant was an agent and this card is issued on 1<sup>st</sup> August, 2002. Despite the alleged incident taking place on 2/5/2013 at the defendant’s premises, there is no attempt whatsoever to show any connection between TOPEN AGENCIES and the respondent company herein. There is no explanation of the relevance of the staff ID card produced in evidence noting that the appellant is indicated as an ‘Agent’ of the said Topen Agencies and whether as at the time of the alleged incident this relationship had ended and if so on what terms (if at all) the appellant had joined the defendant.

20. What emerges at trial is a feeble attempt through oral evidence at cross examination indicating that the appellant was a casual labourer who had been taken to the defendant’s firm by one James to an Askari who gave him work. There is no evidence of any record of such engagement.

21. A cursory look at the P3 form filled in respect of injuries suffered by the appellant does not name the defendant as the culpable entity for the injuries suffered. It states;

*“... he was burnt the whole body when he was assigned duties by an Asian of destroying expired drugs.”*

22. I have noted the submission by the appellant which seems to suggest that the evidence of Mr. Shah of the respondent company was inconsistent and that the respondent did not produce a record of its employees working on the material day to prove that the appellant was

not one of its employees.

23. That submission is not sustainable in Law. It is an attempt to shift the burden of proof on the respondent. The burden lay on the appellant to prove his case within the meaning of **S 107(1)** of the **Evidence Act** and any attempt to shirk this duty must be resisted.

24. The appellant has in submission invoked the common law duty of care under the provisions of **Occupiers Liability Act, Chapter 34** of the **Laws of Kenya** in an attempt to attach liability on the respondent. This act is in my view a belated attempt to amend the claim (and the same attempt I note, was made at trial during submissions) which claim was essentially one under a contract of employment between the appellant and the respondent as particularised in paragraph 5 and 6 of the plaint.

25. In view of the above, I find the conclusions reached by the court on liability sound and this court has no basis upon which to interfere with those findings.

26. On damages, the appellant has urged that damages be enhanced to Shs. 500,000.

27. As regards quantum of damages, the principles upon which an appellate court would interfere with the quantum of damages awarded is well settled. In **Butt –Vs- Khan [1981]eKLR 349** it was stated;

*“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 on a figure which was either inordinately high or low.”*

28. On the material before me, no basis is laid to warrant this court disturb the award made.

29. With the result that the appeal herein lacks merit and is dismissed with costs to the respondent.

**Dated, signed and delivered at Nairobi this 27<sup>th</sup> day of February, 2020.**

**A. K. NDUNG'U**

**JUDGE**