



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CIVIL APPEAL NO. 14 OF 2018

BETWEEN:

JULIUS NDOLO SILAAPPELLANT

AND

KALPATARU POWER TRANSMISSION.....RESPONDENT

Being an Appeal from the whole judgment of the Learned Magistrate

Hon E. G. Nderitu SPM in the SPM's Court Civil Case No 184 of 2014

delivered on 25th June 2018.

JUDGMENT

1. The Court has before it an Appeal from the Decision of Hon. E. Nderitu delivered on 25th June 2018 in Civil Case No. 184 of 2014. The Memorandum of Appeal was filed on 3rd July 2018. The Appellant, Julius Ndolo Sila was the Plaintiff in the suit before the SPM's Court. The Grounds of appeal listed are:

- “1. THAT the learned magistrate erred in law and in fact by delivering a judgment in total disregard of the provisions of the law relating to liability of a servant and independent contractor
2. THAT the Learned trial magistrate erred in law and in fact and misdirected herself by failing to consider at all the submissions made before her by the plaintiff and reached an erroneous conclusion thereto occasioning a miscarriage of Justice
3. THAT the learned trial magistrate erred in law and in fact by failing to appreciate and consider the evidence before her and finding that the plaintiff had not proved liability against the defendant,
4. THAT the learned trial magistrate erred in law and in fact in holding that the defendant was an independent contractor when the same was neither alleged nor proved.
5. THAT the learned trial magistrate erred in both law and in fact in deciding the case against the weight of evidence and in further dismissing the appellants's suit in the court below for want of sufficient evidence.
6. THAT the Learned trial magistrate erred in law and in fact in failing to hold that the defendant was vicariously liable for the acts of its servants.”

2. In her Judgment the Learned Trial Magistrate made several findings that had an impact on her final decision. She found that the Plaintiff was never employed by the Defendant and in fact he had been an employee of a separate entity called Kabew Kenya Ltd which the Defendant alleged was its sub-contractor. She records that she made that finding without seeing the Defendant's record of employees.

3. The Learned Trial Magistrate recorded certain admissions made by the Defendants witness who was the person in charge of administrative functions. It is not known whether he was ever at the site. Mr Victor Musiyo described himself as a finance and administrative officer. He produced a document. He admitted that the Plaintiff was on the site. He confirmed that there was an accident. He admitted that the accident was reported to the site manager (no name was given). He admitted that the site manager was an employee of the Defendant. As a consequence he admitted that the Defendant was on a site that was in the control of the Defendant. He asserted that the Defendant would

employee safety equipment to its staff on the site. He admitted that it was appropriate for safety apparel to be provided on the site. He admitted that the Plaintiff, though on the site was not provided with protective clothing in particular gloves. He blamed Kabew Kenya Ltd who he asserted was the employer. He provided no documentation to support that allegation. That allegation was denied by the Plaintiff. The Learned Trial Magistrate preferred the Defendant's version of the totality of evidence, without waiver or question.

4. The Learned Trial Magistrate records that she saw a sub-contract which was produced in evidence. It was produced by the administrative officer as an attachment to an exhibit. The record does not show whether he was either the person who prepared, alternatively the person who signed the agreement. Nevertheless, the Learned Trial Magistrate after being taken to "Clause 5" of the sub-contract was able to say "*The sub-contract produced clearly affirms the Defendant contention of the existence of the subcontract and the existence of the terms of the subcontract as regard provision of the staff.*". That is statement is interpreted by the Learned Trial Magistrate as confirmation that the Plaintiff's employer was the subcontractor and not the Defendant. The Agreement in question is that dated 1st May 2011.

5. The Learned Trial Magistrate notes the Plaintiff adopted his written statement as part of his evidence and in that he said .. "*on 28th/12/2011, I was working with Kabew Kenya Ltd who were subcontracted by Kalpataru Power Transmission to do...*". In the circumstances, the Learned Trial Magistrate dismissed the suit. Her decision was firmly founded on the fact that the Plaintiff was not employed by the Defendant.

6. The issues therefore before the Court can be summarized thus:

1. Did the Magistrate misdirect herself on the issues arising from the Pleadings?
2. Did the Learned Trial Magistrate fully understand the factual matrix, including the nature of the injury and its cause?
3. Did the Learned Trial Magistrate apply the law of evidence fully and correctly?
4. Did the Learned Trial Magistrate correctly identify the issues in dispute and apply the law correctly?
5. Did the Learned Trial Magistrate have jurisdiction to hear the case?

7. The Facts of the case are relatively, straightforward. The facts that are not disputed are that (1) the Plaintiff was employed to work on electrical transmission towers and (2) The Plaintiff was at work at a site in Sagalla, (3) The Defendant was in charge of that site, and (4) The Defendant had a site manager on that site.

8. It seems to this Court that as a consequence of being in charge of the Site, the Defendant was under and certain legal obligations to provide a safe system of work as well as provide safety equipment and clothing. There are also further duties emanating from being the occupier with control of the Site.

9. The starting point of any analysis must be the Parties' respective pleadings. In his Plaintiff filed on 26th November 2014 the Plaintiff set out his injury as partial amputation of the distal phalanx of the right index finger. He therefore sought the sought the following relief:

- a. Special damages in the sum of Kshs.3,000/=
- b. General damages
- c. Costs of this suit.
- d. Interest on (a) (b) and (c) above at Court rates.

The basis on which the Plaintiff claimed relief was the negligence of the Defendant. At paragraph 5 of the Plaintiff (Paragraph 8 of the Amended Plaintiff) the Plaintiff alleged that "*On or about the 28th December, 2011 the plaintiff was in his lawful duties on the instruction of the defendant, its agents and/or servants, when the defendant provided him with [an] unsafe system of work at the Sagalla Lodge in Voi while erecting rigs for power lines a metal bar cut his right index finger and the middle finger cutting of the last phalanx of the index finger, in the alternative and without prejudice to the foregoing the defendant is wholly to blame for the injuries sustained by the plaintiff*".

10. The alleged negligence was particularised as follows:

- a. Failing to provide the plaintiff with a safe working system.
- b. Failing to provide the plaintiff with protective clothing.
- c. Exposing the plaintiff to the risk of injury or damage, which it knew or ought to have known.
- d. Failing to provide the plaintiff with the right machinery/tools.
- e. Failing to warn the plaintiff in time or at all of the eminent danger.

11. The Defendant did not enter a defence until after the Plaintiff applied for judgment to be entered. Then the Plaintiff amended his case to include two additional defendants, being the sub-contractors, namely Kabew Kenya Limited and Telemachanique Africa Engineering. The Plaintiff then further reconsidered his position and put forward a case where he alleged the other two defendants were agents and the Defendant the principal and therefore vicariously liable for the management etc of the site. The Defendant filed a Defence and then an Amended Defence on 2nd February 2018. In its Defence the Defendant denied that it had employed the Plaintiff (at all) and put forward the positive averment that he was employed by Telemachanique Africa Engineering. The Defendant also denied that it had a duty of care to the Plaintiff. The Particulars of negligence were denied and the injury alleged was also denied. In the circumstances, the Defence comprised a bare denial. The Amended Defence repeats the allegation that the Plaintiff was employed by Telemachanique Africa Engineering. It denies that the Plaintiff was on the site at all. The Defendant also denied that it had a duty of care to the Plaintiff as a term of the contract. Having denied that the Plaintiff was on the site at all, the Defendant goes on to aver that the Plaintiff understood the risk involved in the work and that the injury, if any, was caused by the Plaintiff's own conduct and/or was contributed to substantially by the Plaintiff's own negligence. The Defendant also denies receiving a demand letter and notice of proceedings. The Plaintiff has produced a copy in his list of documents.

12. In the circumstances, the issues that were before the Trial Court for adjudication were:

- a. Where did the alleged accident occur?
- b. Was that a site where the Defendant (or any of them were working)
- c. Was the Plaintiff lawfully on the site?
- d. If so what was the purpose of him being on the site?
- e. While he was on site was the Plaintiff carrying out any work that was of value to the Defendant and/or any of the sub-contractors?
- f. If so was he provided with a safe system of work including safety equipment and clothing.
- g. Did the accident occur or alleged?
- h. If so who was to blame?
- i. Thereafter, having made a finding on liability the Court could move onto quantum including contribution.

13. However, even before she started on that exercise the learned trial magistrate should have considered the question of jurisdiction. Bearing in mind that the Work Injuries Benefits Act came into force in 2008 and the Plaintiff was filed in 2014, and there was an allegation that the Plaintiff was employed by the Defendant, the learned trial Magistrate should have considered whether she was the correct forum for airing that dispute. She did not. If she had, that decision was not recorded. Although subsequent jurisprudence provides leeway, under the strict wording of the Act she did not have jurisdiction on her own analysis of the facts.

14. In her judgment the learned trial magistrate called into question the Plaintiff's case in particular in relation to the discrepancy recorded. In the employment status of the Plaintiff. The Learned Trial Magistrate decided liability on the basis of employment based on her perception of the employer. In fact, the Plaintiff's case is **not** based on employer's liability. However, an intuitive analysis of what the Plaintiff is saying is that he was an employee of the Defendant by reason of the sub-contract. It is correct that the Plaintiff alleged that he was employed by Kalpataru but he said in evidence that he was employed by Kabew Ltd. The Learned Trial Magistrate did not (again) fully consider the issue. Was it an either/or scenario, or a sequential arrangement or a principal agent arrangement. She claimed that it was provided in the Sub-Contract document. In particular Clause 5 as stated by the Defendant. In fact, there were several Clauses numbered 5 in the document produced. The closest any documentary evidence comes to a defining obligations of employment, is Article 3 of the sub-contract agreement. That Agreement is between Kalpataru and Kabew. Article 3 Clause 4 provides for the sub-contractor to submit to the Defendant detailed plans relating to manpower. Clause 5 states; "*The Sub-contractor shall plan to deliver required manpower progressively as per the programme. Local manpower as required by Kenyan law and the main contract shall have to be employed by the sub contractor.*" Clause 6 states "*In the event, the sub-contractor repeatedly fails to accomplish the works under this agreement either in terms of achieving the desired quality and/or achieving the monthly completion in line with the agreed program (Bar Chart) then KPTL reserve the right to either reduce the scope of work or terminate the sub-contract without payment of any compensation and continue with the remaining works through any other agency as deemed appropriate at the risk and cost of the sub-contractor.*". That Clause envisages a scenario where the main contractor (the Defendant) takes over the work and possible workmen of the sub-contractor. The Learned Trial Magistrate did not hear any evidence on that possibility but felt herself able to completely discount it by saying the Plaintiff's allegation that he was previously employed by Kabew and then Kalpataru could not possibly be true. Clearly, she misdirected herself. Further the Defendant did not disclose nor produce in evidence the detailed plans of manpower demonstrating conclusively that the Plaintiff was not included in any list.

15. On the issue of safe systems of work, the sub-contract agreement provides for the Defendant to provide all the materials. That could be interpreted as including safety clothing and equipment under the heading of "*accessories*". Again that is not something that was addressed in the Judgment. The sub-contract agreement also states "*Annexure 1 and 2 attached herewith shall be deemed to be an integral part of this agreement.*". Annexure 2 related to planning for Completion of the project. It could be reasonably expected that "planning" would include staffing levels and matters relating to employment. That Annexure is omitted and/or missing from the copy produced to the Court. In the circumstances, the source of the Learned Trial Magistrate's conclusions is unclear because the contract she had not seen, could not be the source.

16. The Defendant also denied the presence of the Plaintiff on the site at Sagalla Lodge. In the circumstances, the Learned Trial Magistrate would have had to satisfy herself that the area of the alleged accident and the area of the works covered by the sub-contract were the same.

The sub-contract defines the area as A1-A10. Nowhere in the record does it show that the Learned Trial Magistrate appraised herself of the area to which the sub-contract agreement applied.

17. Furthermore, in relation to disclosure the Defendant's List of Documents Lists as its first document a "labour Contract Agreement". That document does not appear on the Court file. However, notwithstanding the various interlocutory changes in pleadings and the absence of documents, the record appears to show that, the Learned Trial Magistrate did not conduct a pre-trial review under **Order 11** of the **Civil Procedure Rules 2010**.

18. On the question of evidential burden, it is readily evident that the Learned Trial Magistrate allowed herself to be swayed by the Defendant's Written Submissions, thereby placing reliance on **Section 107** of **the Evidence Act**. **Section 107** provides that *(1) whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those fact 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.*". In deciding whether the Plaintiff did in fact fall short of that burden, the Learned Trial Magistrate failed to take into consideration **Section 112** of the **Evidence Act** which provides *"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."*. Therefore, it would be the Defendant rather than the Plaintiff who would possess knowledge of the details of the sub-contract, the location of the works, the terms of employment, whether or not the sub-contract was taken over and so on.

19. In the circumstances the Learned Trial Magistrate misdirected herself on numerous matters. As a consequence, that the Plaintiff did not have a fair trial. That is abundantly clear to this Court. It is therefore ordered that:

1. The Appeal is allowed;
2. The Judgment and findings of the Learned Magistrate in **Voi SPMCC No 184 of 2014** is set aside;
3. Time for the Plaintiff to institute proceedings in the forum of his choice is expanded for a period of 30 days from the date hereof.
4. Defendant to pay the Plaintiff's costs of the Appeal.

Order accordingly.

FARAH S. M. AMIN

JUDGE

SIGNED DATED AND DELIVERED at Voi on this the 25th day of February 2020

In the Presence of:

Court Assistant: Josephat Mavu

Appellant: No Appearance. Notice Served by EMS

Respondent: Mr Mosioma Holding Brief for Mr Kabue