



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 20 OF 2018

CEMENT CENTRE LIMITED.....APPELLANT

VERSUS

STEVEN O. OYOLLA.....RESPONDENT

JUDGMENT

The Appellant, **CEMENT CENTRE LIMITED**, has challenged the trial court's finding that it was 100% liable for the accident in which the Respondent, **STEVE O. OYOLA**, was injured.

1. It was the contention of the Appellant that the Respondent had failed to prove that he was an employee of the Appellant.
2. Indeed, the Appellant's assertion was that the Respondent was not its employee.
3. The Appellant's further assertion was that the learned trial magistrate had failed to take into account the facts adduced through the Appellant's evidence. The Appellant expressed the view that if the trial court had given due consideration to the evidence placed before it, by the Appellant, the verdict would have been different.
4. As regards the quantum of damages awarded by the trial court, the Appellant was of the view that the same was so manifestly excessive that the trial court must have applied the wrong consideration in arriving at the said award.
5. In answer to the appeal, the Respondent expressed the view that the Judgment on both the issue of liability and the issue of the quantum of compensation was properly on the evidence and the applicable law.
6. Being the first appellate court, I am obliged to re-evaluate all the evidence on record, and to draw my own conclusions therefrom.
7. Whilst conducting the exercise of re-evaluation of the evidence, I am enjoined by law, to bear in mind the fact that, (unlike the learned trial magistrate) I did not have the benefit of observing the witnesses when they were testifying.
8. In order to get a better appreciation of the evidence, I start by setting out the gist of the pleadings.
9. At paragraph 3 of the Complaint, it was asserted that the Plaintiff was employed by the Defendant as a casual worker, and that he was given employment in the company which was owned and managed by the Defendant.
10. The Defendant stated that the Plaintiff was not its employee on the material date or at any time that was material to this case.
11. The Plaintiff had asserted that on 17th March 2009, he was engaged in his work, at the Defendant's company, where he was off-loading angle-line from the lorry to the store. It was during the said task that angle-line fell and hit the Plaintiff's left leg, causing him to suffer severe bodily injuries.
12. In response to that assertion, the Defendant denied having engaged the Plaintiff to off-load or to remove items from a lorry to the store.
13. The Plaintiff attributed the incident in which he sustained injuries, to the negligence of the Defendant.
14. Secondly, the Plaintiff asserted that he sustained the injuries in issue, due to the Defendant's breach of its statutory duty, which was to provide a safe working system.
15. The Defendant denied the alleged negligence, as well as the alleged breach of statutory duty.

16. But the Defendant also said that if the Plaintiff had been engaged in off-loading items from a lorry to the store, on 17th March 2009, then the Plaintiff “*must have been engaged by an independent contractor who was not an agent of Defendant.*”
17. It was the Defendant’s case that if the Plaintiff sustained injuries, the remedy lay with the independent contractor.
18. Furthermore, the Defendant expressed the view that any injuries which the Plaintiff might have sustained were caused either wholly or substantially, by the Plaintiff’s own negligence.
19. At the trial, each of the parties called one witness.
20. **PW1, STEPHEN OCHIENG OYOLLA**, is the Respondent herein. He testified that on the material date he went to search for work at the Appellant’s premises.
21. **PW1** said that he was hired as a casual, and was assigned the task of off-loading metal bars from the lorry, which he would then take to the store.
22. Whilst he was undertaking the assigned task, a metal bar fell on the Respondent, causing him injuries. **PW1** produced the Treatment Book which was given to him at the New Nyanza General Hospital, where he was accorded treatment after he had sustained injuries.
23. During cross-examination, **PW1** said that he did not have any documents which could prove that he was employed by the Appellant.
24. **PW1** could neither recall the registration number of the lorry which he was off-loading, nor the name of the supervisor who had hired him on the material day.
25. On its part, the Appellant called **GEORGE ABONGO**, as its witness.
26. George (**DW1**) testified that he was the Accountant and he also worked in the Human Resource Department of the Appellant. His duties include writing of the books of accounts; reconciliation of bank account statements; and dealing with employee issues.
27. **DW1** testified that all the employees of the Appellant were required to sign an Attendance Register.
28. He produced the said Register, and pointed out that the Respondent’s name was not in it.
29. **DW1** also testified that whenever an employee was injured, the information would first be registered by him, after which the injured employee would be taken to the Company doctor.
30. He testified that on 17th March 2009, no employee was injured.
31. During cross-examination, **DW1** said that the Appellant never took on casual employees. He emphasized that the Appellant only had permanent employees.
32. It was the testimony of **DW1** that the Appellant had about 10 loaders.
33. But **DW1** also testified that;

“The casuals were working under independent contractors on their own terms. The defendant had engaged the independent contractor. I don’t know employees engaged by independent contractor. I can’t tell the name of the independent contractor that day.”
34. I have re-evaluated the evidence on record.
35. I note that the Respondent was not a permanent employee of the Appellant. He had only gone to the Appellant’s premises on the very day when he sustained injuries.
36. Considering that the Appellant testified that its Attendance Register was signed by all its permanent employees, I find that that would explain why the Respondent’s name cannot have been on the said register.
37. At all material times the Respondent made it clear that he was a casual worker.
38. I have taken note of the fact that whilst the Appellant asserted that it did not employ casuals, **DW1** acknowledged that casuals were working at the Appellant’s premises.
39. Considering that the Appellant did not know the names of the casual employees, it is not surprising that the Appellant did not know the Respondent.
40. The explanation provided by the Appellant, for not knowing the Respondent was that the casuals were engaged by an independent

contractor, as opposed to being engaged by the Appellant.

41. When the Appellant's witness was asked to provide the name of the alleged independent contractor who had been engaged by the Appellant, he said that he was unable to do so.

42. In my considered opinion, the Appellant was attempting to escape from liability by introducing an alleged independent contractor onto the scene.

43. However, when the Appellant failed to provide the particulars of the alleged independent contractor, who it had engaged, I find and hold that the Appellant cannot be permitted to escape liability for things which took place within its premises.

44. When the Appellant engaged the alleged independent contractor, who then assigned tasks to the Respondent, and because those tasks were undertaken within the Appellant's premises, the Appellant cannot escape liability for the injuries which the Respondent sustained whilst undertaking the tasks assigned to him. I so find because the Respondent went to the Appellant's workplace to seek employment.

45. He was given employment. As far as he was concerned, it is the Appellant who had employed him. To my mind, that would be the most reasonable conclusion that the Respondent was entitled to draw.

46. If the Appellant failed, as it did, to make it clear that the persons who sought employment at its workplace, and who were engaged as casuals were not employees of the Appellant, such employees were entitled to conclude that it is the Appellant who had employed them.

47. As the learned trial magistrate noted in his judgment;

“The Plaintiff having reported on duty as a casual worker on the very day he was injured, I doubt if he could qualify to be reflected in the muster roll among other salaried employees of the defendant.”

48. I hold the considered view that the trial court cannot be faulted for that conclusion.

49. I therefore uphold the trial court's finding, that the Respondent was a casual employee of the Appellant on the material day.

50. He was injured whilst carrying out the duties assigned to him, within the Appellant's workplace.

51. Considering that the Respondent was injured when some metal bars slipped from the lorry and fell on him, I find that the trial court was right to have held the Appellant 100% liable.

52. I find that there was absolutely no evidence of any contributory negligence on the Respondent's part.

53. Finally, on the issue of the quantum of damages, the Appellant failed to demonstrate that the trial court made any error, in principle. It has not been shown that the trial court either took into account some irrelevant consideration or that the said court failed to take into account some relevant consideration.

54. In the result, there is no basis, in law, for interfering with the trial court's assessment of the General Damages.

55. Accordingly, the appeal lacks merit, and it is therefore dismissed. The Appellant will pay to the Respondent, the costs of the appeal.

DATED, SIGNED and DELIVERED at KISUMU This 22nd day of October 2020

FRED A. OCHIENG

JUDGE