



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIVASHA**

**(CORAM: R.MWONGO, J)**

**CIVIL APPEAL NO 26 OF 2020**

**(Formerly CIVIL APPEAL NO 25 OF 2018)**

**AFRICAN HYDROPONICS LIMITED.....APPELLANT**

**VERSUS**

**VIRGINIA WAIRIMU NGUA (Suing as Legal Representative of  
the Estate of AUGUSTINE MWIHIA KIMANI).....RESPONDENT**

*(Being an appeal from the judgment of the Hon. V. Chianda (SRM) delivered on the 16<sup>th</sup> April 2018 in Naivasha CMCC No. 148 of 2015)*

**JUDGMENT**

1. In the lower court, the Respondent sued the Appellant for damages arising out of an accident that occurred when the Respondent was overseeing work in the Appellant's greenhouse.
2. After a full hearing in which the two witnesses for the Plaintiff and a defence witness testified, the trial court awarded damages as follows:

Pain and Suffering	Kshs.	100,000.00
Loss of Expectation of Life	Kshs.	100,000.00
Loss of Dependency	Kshs.	711,256.00
Special Damages	Kshs.	1,035.00
<b>Total</b>	<b>Kshs.</b>	<b>912,291.00</b>

3. The Appellant's appeal is against the award of both liability and quantum. The Appellant's challenge is grounded on eight grounds, but essentially asserts that the entire judgment is wholly unreasoned not based on any legal principles, lacks merit in substantiated and is of prior legal jurisprudence.
4. Thus court's role is to scrutinize and re-evaluate the entire evidence on record and come to its own conclusion being cautious to note that this court did not hear the witnesses or see their demeanour. See **Selle & Another v Associated Motor Boat Co. Limited & Others [1968] EA 123**:

*“I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High 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. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on 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 (Abdul Hameed Saif v. Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).”*

5. The Plaintiff/Defendant's case in the lower court alleged that the deceased worked as an employee under a contract of employment for the Defendant. That the Defendant was contractually obliged to take all necessary precautions to ensure the safety of its employees and to provide a safe working environment; that in breach of that employment contract, the Defendants officials instructed the deceased to oversee construction of a greenhouse on behalf of its client Agri Bio Lex in Naivasha.

6. Further, the Plaintiff pleaded that the construction work went on well on 14<sup>th</sup> March, 2014. Whilst making certain measurements the deceased slipped and a metal rod he had hoisted perpendicularly tilted and touched the nearby electric wire, and electrocuted the deceased.

7. The Defendant's case on the other hand, was that the Plaintiff was not their employee either as a technician or foreman at or before the time of the accident; that even if he had been so employed, which they denied, the accident was due to his own negligence in failing to use proper equipment and tools, exposing himself to danger and failing to take steps to avoid the accident.

8. After the hearing, the Plaintiff adopted her witness statement and testified that she was the deceased's wife; that he was 37 years old at his death; that he was employed by the Defendant as a technician and earned about Kshs 35,000/= per month. She produced as exhibit, P. Exhibit 2, a list of documents and supplementary list of documents as P. Exhibit 3. She testified that she learnt of his death from JM, her husband's colleague, who explained how the deceased slipped whilst hoisting a metal rod that touched an electric line and was electrocuted.

9. She testified that they had two children, AW and AI, born on 10<sup>th</sup> July, 2008 and 17<sup>th</sup> September, 2012 respectively.

10. PW2 JM was the deceased's colleague. He testified that he was a casual worker; he said they were constructing a greenhouse and the deceased was his foreman at Agrovea Africa. He said the company gave them the spanners and drilling machines, and that they learned to work there "on the job". In cross-examination he said the deceased used to do piece work.

11. In his witness statement, PW2 JM stated that:

***"the defendant through its officials instructed the deceased herein and myself, employees on 14<sup>th</sup> March, 2014 to oversee construction of a green house on behalf of its client Agri Bio Lex....."***

Further that:

***"As a foreman he (deceased) used to earn a salary depending on the work done. He used to pay us our salaries after receiving the same from the Defendant. Literally he earned more than myself due to his knowledge of work and expertise."***

12. The sole defence witness was CM the Managing Director of the Defendant. He said the deceased was an independent contractor, who had a construction agreement with Agri Buyers resulting in the deceased working for him. He did not have the construction agreement in court at the time. He had 7 permanent employees and no casuals. The Defendant insured its employees with CIC Insurance Company but the deceased was not a beneficiary under the policy.

13. DW1 stated that due to the deceased's prior record, they subcontracted him independently to handle a portion of a project at Agri Bio Lex; that professional fees were negotiated and payable on completion by phases; but that he did not have the contract or minutes of the company showing the contract terms; That once the project was completed the deceased would hand over the project having actualized it; that as an independent contractor the deceased was responsible for determining his own work environment.

### **Whether the Deceased was an Employee or Independent Contractor**

14. The evidence is rather sketchy and the oral evidence contradictory. However there is documentary evidence that may indicate the nature of the deceased's working arrangements, in absence of a contract.

15. The various delivery notes exhibited by the Plaintiff show that the Defendant company delivered the items described in the delivery notes to Golden Tulips. The recipient was one Augustine, the deceased, hence why he would have them in his possession. My understanding of these delivery notes is that there were items being delivered to Golden Tulip by Defendant, and at the receiving end on behalf of Golden Tulip, was Augustine who signed for them. It does not make sense that if A was an independent contractor appointed by the Defendant, he would be receiving items sent by the Defendant to Golden Tulip, unless he was working on a project for or on behalf of the Defendant or for or with Golden Tulip.

16. Secondly, the Plaintiff produced a Kenya Commercial Bank Cheque Deposit slip for a cheque drawn by the Defendant and paid in by AK the deceased. It is for Kshs 293,607/= deposited on 31<sup>st</sup> July, 2013. In the Plaintiff's list of documents it is described as a "deposit slip for salary payment by the Defendant." Yet in the plaint, the Plaintiff pleaded that the deceased earned in average Kshs 35,000/= per month. PW2 said they worked on a piece work basis and that the deceased earned a salary depending on the work done.

17. From the cumulative evidence above, I gather that the deceased sometimes was paid lump sum amounts and would pay his workers such as PW2 from such sum. There is no documentary evidence that he was paid a monthly salary as suggested in the plaint, although PW1's knowledge of the deceased's work was that he was paid a salary based on the amount of work done. In oral evidence, she said he worked for "peace (sic piece) work."

18. The Defendant, in alleging an independent contract, could easily have provided evidence of the contract (if any) for the services rendered by the deceased, or show instructions authorizing the deceased to do work on its behalf as a technician. This would demonstrate the Defendant's allegation that he was an independent Contractor; or it could have availed the payment schedule showing the nature of payment

made. It did not. What DW1 did say in his written statement was, however, that:

***“the Defendant neither withheld statutory deductions payable to the tax collector nor did he pay his NSSF/NHIF as is the case with other employees.”***

19. Further, if the deceased was a sub-contractor as alleged by the Appellant, it would have been easy enough for the Appellant to show the payment scheme including invoices and or payment voucher for the sub-contract. This would also show the statutory tax deduction under the Value Added Tax Act 2012 for VAT on the sub-contract payment to put to rest its assertion on the sub-contract, as it is not clear whether work by the deceased was piece work or sub-contract work.

20. DW1 in oral cross-examination stated that the deceased was not insured by the Defendant like other employees. The Defendant did not, however, avail any document to counter the written confirmation by their counsel - put to him in cross-examination - in response to the Plaintiff's demand letter where it was stated as follows:

***“Our client is well aware of the death of Mr. Augustine Mwihia Kimani and the circumstances surrounding his death are currently under investigations. Please note that the deceased was covered under our accident policy by a reputable insurance company which has already received our client's requisition and they are processing the same.”*** (Emphasis added)

21. The overall evidence appears to suggest that the deceased could have been employed on piece work basis by the Defendant, and I am persuaded that this was the case in the present case.

22. “Piece Work” is defined in Section 2 of the Employment Act as follows:

***“ ‘piece work’ means any work the pay for which is ascertained by the amount of work performed irrespective of the time occupied in its performance.”***

Section 18 of the Employment Act provides as follows with regard to piece work:

***“18. (1) Where a contract of service is entered into under which a task or piece-work is to be performed by an employee, the employee shall be entitled:-***

***(a) when the task has not been completed, at the option of his employer, to be paid by his employer at the end of the day in proportion to the amount of the task which has been performed, or to complete the task on the following day, in which case he shall be entitled to be paid on completion of the task; or***

***(b) in the case of piece-work, to be paid by his employer at the end of each month in proportion to the amount of work which he has performed during the month, or on completion of the work, whichever date is the earlier.”***

23. In **Krystalline Salt Limited v Kwekwe Mwakele & 67 others [2017] eKLR** the Court of Appeal considered the question of piece work as follows:

***“The Employment Act recognises four main types of contracts of service; contract for an unspecified period of time, for a specified period of time, for a specific task (piece work) and for casual employment.***

***Piece work form of employment is defined in section 2 to mean:***

***“...any work the pay of which is ascertained by the amount of work performed irrespective of the time occupied in its performance”***

***In a piece work or, as it is sometimes called, piece rate arrangement, the emphasis is on the amount of work and not the time expended in doing it. The decision to elect which form of employment to go for, either as an employee or employer will depend on a number of factors, but the dominant consideration is, for the employee, the earnings and other physical conditions of employment, and on the other hand, savings for the employer. An employee under piece work arrangement, though not entitled to all or some of the benefits of the other forms of employment, is at least entitled to minimum wage.”*** (Emphasis added)

24. I have carefully perused the cases of **Maurice Oduor Okech v Chequered Flag Limited [2013] eKLR** and **Kiganjo Bakery Limited v Jackson Ndirangu [2019] eKLR** relied on by the Appellant.

25. In **Maurice Oduor's** case the clear evidence established was that the Plaintiff was a cushion maker trading in the name and style of “Oketch's U/Car Cushioning”; in addition, cash sale receipts, local purchase orders, payment vouchers as per specific job cards were shown to have been in use. In other words as held by the court, the fundamental behaviour of the parties is what assists in determining whether a contract of service or a contract for services exists. In **Maurice Oduor** the conduct and documentation between the parties led the court to find that there was contract for services.

26. In **Kiganjo Bakery** the court found there was no contract of services on the strength of petty cash vouchers showing “payment for all contracted works (plumbing).”

27. Here, as earlier stated, there is a letter stating that the deceased was on the defendant's insurance policy - which was verbally denied - but no proof in rebuttal was availed. Further, the deceased would be issued with items from the defendant for delivery to companies where presumably he would install them. Thus, there is no clear evidence that the installations done by the deceased were de-linked from the Defendant. In addition, PW1 testified that the deceased was employed in 2008 as a casual based on piece work. PW2 stated that both he and the deceased learnt their trade on the job within the Defendant Company. From these, the persuasive position is that the work undertaken was piece work, in absence of evidence of sub-contract evidence.

28. In the defence, the defendant denied that the deceased had employed the Plaintiff as technician or foreman (paragraph 3), and generally avers that the Defendant was a stranger to the employment claims. However, the Defendant did not plead that the deceased was an independent contractor, which gives the impression that the Defendant was not quite certain of the nature of the work contract between it and the deceased.

### **Liability and Quantum of damages**

29. Having come to the conclusion from the evidence that the Plaintiff was engaged in piece work under a contract of service, the next issue is whether it owed a duty of care to the deceased. If so, whether the finding of liability and award damages were properly done by the trial court.

30. Here, the Appellant did not delve into the question of liability except in stating on appeal that the trial magistrate misdirected himself by importing extraneous and illogical holding that the Appellant was liable for the death of the deceased, yet no evidence in form of a police abstract or post mortem was adduced in support of the same.

31. The death of the deceased was not in dispute. The statement of DW1 clearly refers to Augustine as the deceased on page 1, and on page 2 he stated:

***“Up until his untimely demise, the Defendant’s technical team had inspected the project and found it fit.***

***It is unfortunate that the deceased died, however...”***

In oral cross-examination he said that the Defendant used to give the deceased contract work.

32. Nor is there any dispute with regard to the deceased's age, and number or ages of his children. There is also no challenge by the Appellant as to whether the award was too high or as to its calculation. The whole thrust of the Appellant's case and appeal were hinged upon the deceased having been an independent contractor, and thus that no duty of care was owed by it to the deceased.

33. In light of my finding herein, however that there was an agreement for piece work, the challenge on liability fails, and there being no substantive challenge on quantum, I uphold the same.

### **Disposition**

34. Accordingly, the Appellant's appeal fails on all grounds and is hereby dismissed with costs.

### **Administrative directions**

35. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

36. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

37. Orders accordingly.

**Dated and Delivered in Naivasha by teleconference this 19<sup>th</sup> Day of November, 2020.**

---

**R. MWONGO**

**JUDGE**

Attendance list at video/teleconference:

1. Mr. Kaumbi for the Appellant
2. Mr. Musungu for the Respondent

### 3. Court Clerk - Quinter Ogutu