



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NYERI**

**CIVIL APPEAL NO.119 OF 2009**

**KIGANJO BAKERY LIMITED.....APPELLANT**

**-VERSUS-**

**JACKSON NDIRANGU.....RESPONDENT**

**JUDGMENT**

1. This is an Appeal from the judgment of Honourable K. Cheruiyot RM delivered on 1<sup>st</sup> October, 2009 in Nyeri CMCC No. 461 of 2017; in the said suit, the Respondent sued the Appellant for injuries suffered while in the course of his employment with the appellant.

2. The trial Court found in favour of the Respondent and awarded him Kshs.150,000/= as damages plus costs and interest.

3. The Appellant being dissatisfied with the judgment of the trial Court filed a Memorandum of Appeal on 30<sup>th</sup> October, 2009; there are four grounds of appeal which can be summarized into two main grounds as set out hereunder:-

**(a) Was the Respondent an employee of the Appellant;**

**(b) Did the Appellant owe the Respondent any duty of care;**

4. The parties canvassed the appeal by way of written submissions and are summarized hereunder;

**APPELLANTS SUBMISSIONS**

5. The Appellant's submissions are that the Respondent was never an employee of the Appellant but rather an independent contractor; it is the Appellant's contention that the trial Court based its judgment on a LD 104 Form that was supposedly excluded from evidence by the Learned Magistrate; it is their submission that the judgment of the trial Court was based on no evidence and should therefore be set aside and dismissed.

**RESPONDENTS SUBMISSIONS**

6. The Respondent's submission in response is that this Honourable Court has no jurisdiction to hear this matter and the same should be dismissed; it is their contention that the Employment and Labour Relations Court is the rightful forum to hear this appeal; counsel for the Respondent also submitted on the said LD 104 Form, it is their contention that the same was properly produced as evidence; further, there is no evidence of what document was excluded as such the Appellant cannot definitely say it was the said Form; and their prayer is that the trial Court's judgment be upheld.

**ISSUES FOR DETERMINATION**

7. After reading the written submissions filed herein and hearing the oral submissions of both counsels for the Appellant and Respondent this court finds three issues for determination;

(i) Whether the appellant was the Respondent's employer; and whether this court is seized of jurisdiction;

(ii) Whether the appellant owed the Respondent a duty of care;

**ANALYSIS**

8. Before delving into the evidence that was produced at the trial Court it is imperative to state that the duty of an Appellant with regard to a

first appeal especially on the issues of fact is to evaluate afresh the evidence recorded before the trial court in order for it to reach its own independent conclusion; this court is guided by the case of **Selle v. Associated Motor Boat Co. Ltd (1968) EA 123** **Selle and Another v. Associated Motor Boat Company Ltd And Others, [1968] 1 EA 123 (CAZ)** where it was held that;

***“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).”***

**Whether the Appellant was the Respondent’s employer?**

9. At the trial of this matter, the Respondent testified that he was working for the Appellant as a plumber; on the fateful day he was fixing a leakage on a paraffin pipe and that he was working atop a ladder which was being held by his assistant; while undertaking this task, he fell and injured himself.

10. The Respondent was treated at Nyeri PGH and a Medical Examination Card was produced as ‘**PEXh.1**’; a receipt from a pharmacy was produced and marked as– ‘**PEXh.2(a)**’; there was a form that was described by the Respondent as;

***“...This is the Form that was filled at the Defendant’s office and by the doctor...”***

11. Its production as PEXh.2(b) was opposed by counsel (Mr Karuweru) acting for the Appellant at the trial in the lower court; the trial magistrate upheld the objection and the record reads as follows;

***“.....Objection is allowed. Document is excluded...”***

12. Upon cross-examination, the Respondent testified that he had worked for the Appellant from June 2002; the matter was then adjourned by the Respondents counsel at the trial in the lower court who stated that;

***“... I wish to apply for an adjournment. There is a document we wish to produce.”***

13. When the matter came up for further hearing on 28<sup>th</sup> May, 2009, the Respondent proceeded to close his case and the Appellant proceeded with its defence case.

14. The appellant called one witness **DW1** who testified that the Respondent had be hired to carry out works in their garage and was therefore not an employee; **DWI** produced a handwritten note as ‘**DEXh.1**’ and petty cash vouchers marked as ‘**DEXh2**’ and a cash sales receipt was marked as ‘**DEXh.3**’; **DW1** testified that the Respondent was paid via petty cash vouchers because he wasn’t an employee; further that they had no supervisory role over him; under cross-examination, **DW1** testified that they took the plaintiff to hospital after he was injured; further that they were not Responsible for providing the Respondent with protective gear.

15. The parties then filed their respective submissions and the trial court in its judgment found that the Respondent was an employee of the Appellant referred to a Form LD 104 (**PEXh.3**) which is a Form under the Workmen’s Compensation Act (now repealed); upon careful perusal of the record this court notes that there was no production of a ‘**PEXh.3**’; the trial Court’s record of the exhibits produced at hearing also bears no such ‘**PEXh.3**’; the documents produced as exhibits by the Respondent at the trial were duly marked and the listing in the court record as follows;

(i) **PEXh.1** – Out-patient Card from Nyeri Provincial Hospital

(ii) **PEXh.2(a)** – Receipt from the above Hospital

(iii) **PEXh. 2 (b)** – Receipt from Jopharma Pharmaceuticals

16. The upshot is that the trial magistrate took into account evidence that was not properly on record; this being the position, did the Respondent prove he was an employee of the Appellant? In answer to this question, it is important to distinguish between a ‘**contract of service**’ and a ‘**contract for services**’; this court makes reference to the case of **Everret Aviation Limited Vs the Kenya Revenue Authority [2013] eKLR**, where it was held that:-

***“...in determining whether a relationship between parties is a contract for services between two independent parties or a contract of service giving rise to an employer/employee relationship, the traditional tests of control of the work by the employer and its integration into the employer’s core business are no longer conclusive. In my view, the fundamental behaviour of the parties such as the form of documentation evidencing the relationship and the mode of payment is critical...”***

17. The Respondent did not produce any evidence to show he was an employee under a contract of service especially one who had been working for his employer for two (2) years; at the very least, the Respondent could have given evidence of payment of salary for the two years of employment; there is therefore no evidence to corroborate his testimony.

18. The learned Magistrate also noted that the quotation produced by the Appellant was not clear as to whom it referred to; never-the-less the exhibit 'DExh.2' a petty cash voucher indicates that it is as being;

***“.. Being part payment for all contracted works (plumbing)...”.***

19. The voucher is for Kshs.2,000/= and has been signed at the bottom; the Respondent denied this was his signature at trial but upon comparison with the signature on the Verifying Affidavit filed with the plaint the similarity between the two is noted; the most probable conclusion is that the Respondent was the one being paid using the petty cash vouchers produced as 'DExh.2 and 3'.

20. From the mode of payment of the Respondent it is clear that he was hired as an independent contractor to carry out plumbing works with the Appellant; this court is satisfied that the Respondent was not the Appellants employee; and it therefore follows that this court has jurisdiction to hear and determine this matter;

21. This ground of appeal is found to have merit and is hereby allowed;

**Whether the Appellant owes the respondent a duty of care?**

22. Having established that the Respondent was an independent contractor, this court will not belabor itself in addressing this issue; this court is satisfied that there was no duty of care owed to him by the Appellant; he ought to have taken care of his own safety.

23. This ground of appeal is found to have merit and it is hereby allowed.

### **FINDINGS AND DETERMINATION**

24. This court finds that the Respondent was not the Appellants employee; and further finds that this court is seized with jurisdiction to hear and determine the appeal;

25. This court finds that there was no duty of care owed to the Respondent by the appellant;

26. The appeal is found to have merit in its entirety; and it is hereby allowed; the judgment of the lower court is hereby set aside and the suit against the Appellant/Defendant is hereby dismissed;

27. Each party shall bear its/their own costs in the lower court as well as on appeal;

It is so ordered.

**Dated, Signed and Delivered at Nyeri this 21<sup>st</sup> day of February, 2019.**

**HON.A.MSHILA**

**JUDGE**