REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 176 OF 2016

JACKSON AZIAYA...................................APPELLANT

-VERSUS-

AFCONS AFRICA...................................RESPONDENT

(Being an appeal from the judgment of Honourable Wachira

delivered on 18th March, 2016 in CMCC NO. 1480 OF 2013)

J U D G M E N T

1. The Appellant instituted a suit against the respondent vide a plaint dated 22nd March, 2013. Therein, the appellant sought for general and special damages for negligence and breach of statutory duty of care owing from the respondent.

2. Briefly, the appellant pleaded that while working at the respondent's site in Cabanas as its employee on or about 6th March, 2012 he fell down from a height while standing on trappers, causing him to sustain serious injuries.

3. The respondent put in a statement of defence in opposition to the facts pleaded in the plaint.

4. At the hearing, the appellant relied on the evidence of two (2) witnesses including himself, while the respondent called one (1) witness. Dr. Cyprianus Okoth Okere gave evidence as *PW1*, by and large confirming the blunt head injury sustained by the appellant and further producing the medical report dated 10th May, 2012. The said witness added that the appellant has since recovered.

5. The appellant who was *PW2* testified that he had at all material times been employed by the respondent as a mason and that on the material day, he was assigned with the duty of doing plaster work at the respondent's site at Cabanas. That he was given a ladder which was unstable and upon informing the foreman, he was advised to continue using it and he complied.

6. The appellant also testified that he soon thereafter fell off the ladder and was rushed to Nairobi West Hospital unconscious. Upon cross-examination, the appellant stated that he and other employees were issued with work cards every Monday and which cards were returned to the employer every Saturday upon signing.

7. Thomas Ondeva Musa being the sole defence witness testified inter alia that he had worked for the respondent for a number of years as its Office Manager and that at all material times, he never knew the appellant to be an employee of the respondent or that any injuries similar to those sustained by the appellant were reported on the material day. This witness further denied there ever being a project belonging to the respondent at Cabanas.

8. At the close of the hearing, parties filed and exchanged written submissions. In her resulting judgment, the learned trial Magistrate held that the appellant had failed to prove he was an employee of the respondent such that the said respondent owed him a statutory duty of care or that the respondent was to blame for the injuries he sustained. It therefore follows that the appellant's suit was dismissed with costs to the respondent. On quantum, the trial magistrate reasoned that had she found the appellant entitled to the same, she would have awarded him the sum of Kshs.200,000/= for pain and suffering alongside special damages of Kshs.7,000/= as pleaded and proved.

9. The appeal now before this court is a result of the aforementioned judgment. The memorandum of appeal dated 4th April, 2016 raises four (4) grounds hereunder:

i. THAT the learned trial magistrate erred in law and in fact by holding that the appellant had failed to prove that he had

been employed by the respondent despite uncontroverted evidence having been adduced to that effect.

ii. THAT the learned trial magistrate failed to judiciously analyze the evidence on record thus arriving at a finding that was outrightly and highly unjust.

iii. THAT the learned trial magistrate erred in law and in fact by failing to make a finding on the issue of quantum.

iv. THAT the learned trial magistrate erred in law and in fact by arriving at a finding that the respondent did not owe the appellant any duty of care.

10. The parties agreed to have the appeal canvassed through written submissions. The appellant's submissions have brought forth the arguments that first and foremost, he had proved his employment with the respondent on a balance of probabilities by way of his oral evidence, a fact which the learned trial magistrate disregarded, adding that the respondent's witness did not adduce any documentary evidence to rebut his evidence.

11. The appellant also submits that being merely an office manager, DW1 was not the appropriate person to ascertain whether or not there was a site project in Cabanas at all material times.

12. It is the appellant's further submission that the responsibility fell upon the respondent to keep and avail a record of all its employees at the trial so as to rebut his evidence on employment. The cases of ***Lawi Wekesa Wasike v Mattan Contractors Limited [2016] eKLR*** and ***Lucus Mzee Wamukota v Riley Falcon Security Ltd [2016] eKLR*** were cited to buttress this point.

13. As concerns ground (iii) of appeal on quantum, the appellant acknowledged that the trial court had sufficiently addressed the subject of quantum and thus opted to abandon the said ground.

14. On its part, the respondent simply submits that the evidence adduced by the appellant before the trial court was weak and unsustainable to say the least, since he was unable to establish employment with the respondent.

15. The respondent further submits that the appellant failed to point out any other persons who were working on the site on the material day or at least the persons who took him to hospital, carefully adding that the initial burden of proof lay with the appellant to prove his case against it and not the other way round. Various authorities were relied upon in the respondent's submissions.

16. In that case, I have taken into consideration the rival submissions placed before me alongside the respective cited authorities. This being a first appeal, I am required to re-evaluate the evidence presented before the trial court in a bid to determine whether the decision arrived at was proper in light of the said evidence.

17. As earlier mentioned, ground (iii) of appeal has been abandoned and I shall therefore cast focus on the remaining grounds which essentially touch on the question of liability.

18. In so doing, I shall address the remaining grounds together since they are related. The issue of concern is really whether the appellant proved his employment with the respondent on a balance of probabilities so as to give rise to a statutory duty of care by the respondent.

19. I have perused at the typed proceedings attached to the record of appeal. On the one hand, the appellant in his evidence before the trial court stated that he was employed on a casual basis and had worked for the respondent for two (2) weeks prior to the date of his injury. He also stated that when he regained consciousness after the fall, he found himself in hospital and that it is his colleagues who had taken him there. The appellant added that the respondent covered the hospital bill.

20. The appellant further testified on cross-examination that it is the foreman who would pay him salary and that he was issued with a work card which he would keep from Monday up until Saturday when the same would be returned and he would sign in exchange for his wages. The appellant included in his testimony the fact that there was a sign board bearing the respondent's name at the entrance of the site.

21. DW1 on the other hand denied that the respondent had any project at Cabanas and further indicated that he was not familiar with any Sign Boards belonging to the Respondent at Cabanas. The said witness confirmed that all employees were issued with a work card and that a Muster Roll was maintained for the casual employees, though there was no Muster Roll for March, 2012 since the respondent did not have a project in Nairobi at the time.

22. On cross-examination, DW1 confirmed that in instances of injuries at the respondent's place of work, the said respondent would ensure the injured employee is taken to hospital and the company would also cater for such employee's medical costs by way of Insurance.

23. In her judgment, the learned trial magistrate reasoned that the appellant had not adduced any evidence to ascertain that he was an employee of the respondent, whether by way of a work card or the evidence of a witness. The learned Magistrate further reasoned that since the Respondent had argued that it did not have a site at Cabanas, it was upon the appellant to demonstrate otherwise but this was not done. In the end, the trial magistrate concluded that the appellant had not established culpability on the part of the respondent or that a statutory duty of care was owed to him.

24. Firstly, going by the oral testimony of PW2 and DW1 on the issue of the work cards, it is apparent that the Respondent issued work cards to its employees at the beginning of the week up until Saturday when the said cards were returned and the respective employee would sign against it. Infact, DW1's evidence confirmed this as the position obtaining at the Respondents place of work at the material time. The

evidence on record was also that the Respondent could retain the work card at the end of the week. In this instance a work card would have sufficed as an indication of employment, though it would appear the same was retained by the respondent on the weekends. It is thus probable that the appellant did not have a work card in his possession to showcase in the course of the suit if at all he was an employee of the Respondent.

25. That notwithstanding, though documentary evidence carries a substantial degree of weight under the rules of evidence, it is not the only evidence that can be relied upon. The evidence of witnesses is just as relevant particularly in cases where documentary evidence is lacking.

26. On that note, the appellant mentioned before the trial court that it is his colleagues who took him to hospital. Nevertheless, none of those colleagues or any other co-workers for that matter were called as witnesses to corroborate the accounts given by the said appellant or in the alternative verify the appellant's employment with the respondent. This was a key observation made by the learned trial magistrate in her decision.

27. Further to the foregoing, it is evident that the existence of the site at Cabanas where the appellant claims to have been working on the material day was disputed and yet nothing was placed before the trial court to corroborate his version of accounts specifically, thus making it quite impossible to determine with certainity whether there in fact existed a site at Cabanas belonging to the respondent. The long and short of it is that the onus was on the appellant to establish that there was a site at Cabanas belonging to the respondent but this was not done.

28. Also, while the appellant mentioned that there was a foreman in charge of the site in which he worked, he contradicted himself by stating in his examination-in-chief that the said foreman is named Walter while indicating on cross-examination that he could not recall the foreman's name. Regardless of whether the appellant's statement regarding the foreman was true, there was once again no corroborating evidence of such statement.

29. I also do recall the appellant's argument that the respondent took care of his medical bill at Nairobi West Hospital. I have perused the medical documents constituting the record of appeal and the appellant's list and bundle of documents availed to the trial court. The said documents confirm that the appellant was attended to and treated at Nairobi West Hospital. However, no evidence was adduced to show the respondent's contribution in catering for the hospital bill.

30. On a different note, I wish to once again draw attention to the renowned legal principle that he who alleges ought to prove. In the present instance, the burden of proof lay with the appellant to prove his case on a balance of probabilities. Put another way, it was upon the appellant to buttress his allegations with concrete evidence as proof of employment which would then give rise to a statutory duty of care. I have already established that save for his oral testimony, there is nothing more to show that he was an employee of the Respondent or that he was injured at the respondent's site, if at all, such site was in existence to begin with. As it were, the learned trial Magistrate could only therefore rely on the evidence presented before her and more so, the oral evidence by the respective witnesses.

31. It therefore follows that the Appellant did not manage to prove employment, the ripple effect is that the statutory duty of care could not have applied herein. The end result is that the blameworthiness of the respondent for the injuries sustained was not proved on a balance of probabilities. As such, I have no reason to doubt that the learned trial magistrate correctly applied the relevant legal principles in addition to considering the evidence tendered before her and am satisfied that the decision by the said magistrate was right.

32. The upshot is that the appeal is hereby dismissed as a whole for being unmeritorious. The respondent shall have the costs.

Dated, signed and delivered at NAIROBI this 20TH day of JUNE, 2019.

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L. NJUGUNA

JUDGE

In the presence of:

....for the Appellant

....for the Respondent