REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 115 OF 2016

PATRICK OMUTERE..APPELLANT

VERSUS

ACCURATE STEEL MILLS LIMITED……..............................RESPONDENT

(Being an appeal from the judgment and decree of Hon. (Ms) Racheal Ngetich (Resident Magistrate) Milimani Law Courts in Civil Suit No. 17 of 2014 delivered on 12th February, 2016)

JUDGEMENT

1. The appellant filed suit vide plaint dated 20/12/2013 seeking reliefs;

(a) Special damages Kshs.3,000/=.

(b) General damages.

(c) Costs for further medical care; and

(d) Costs and interest.

2. The appellant pleaded that he was at the material time an employee of the respondent with a contract with express and implied terms that the respondent was to take reasonable precautions for the safety of the appellant while he was engaged upon his work not to expose him to risk of damage or injury which respondent knew or ought to have known to provide and maintain adequate and suitable measures to enable appellant carry out his work in a safe and property environment of working.

3. Thus on 29/10/2010 the appellant was performing his duties within the scope of his employment as instructed by the respondent at its premises when he was involved in an industrial accident.

4. At the time he was hammering metal when a (metallic object) fell on him causing serious harm on his left wrist.

5. He attributed accident to respondent’s negligence, breach of contract and/or breach of statutory duty of care towards workers and especially himself (appellant).

6. He pleaded particulars of negligence or breach of contract, injuries and special damages.

7. The respondent via a defence dated 24/2/2014 denied the appellant’s claim and especially that the appellant was its employee and particulars of negligence, statutory duties, injuries and damages pleaded in alternative. It attributed cause of accident to negligence on part of the appellant and specifically set out particulars thereof.

8. The matter was heard and the trial court dismissed suit as both appellant and DW1 confirmed in evidence that the appellant was employee of a sub-contractor not of the respondent.

9. Being aggrieved by the above decision, the appellant appeal and set out 5 grounds in memorandum of appeal namely:

i. The trial court erred in finding that appellant had been employed by sub-contractor.

ii. Trial court failed to find respondent liable and award damages.

iii. Failed to appreciate nature and cause of injuries occasioned.

iv. Failed to appreciate evidence tendered by appellant.

v. That the appellant proved case on balance of probabilities.

10. The parties agreed to canvass appeal via submissions but only appellant who filed and served the same.

APPELLANT'S SUBMISSIONS:

11. On whether the appellant was employed by the respondent, it is the appellant's submission that the learned magistrate erred in law in finding that the appellant had been employed by a sub-contractor whereas the respondent was the principal employer. Further the sub-contractor in question was an employee of the respondent and therefore there existed a principal agent relationship between the respondent and the sub-contractor.

12. In ***Civil Case No. 626 of 1987 – Mwanthi vs Mbwana Construction Limited*** where the appellant was hired by a sub-contractor, it was held that, ***"the onus of prove on whether or not a person has been employed lie on.......the test whether the alleged servant was under control or and bound to obey the orders of the alleged master; if he is then the relation of master and servant exists...."***

13. On the issue of liability, it is its submission that the learned magistrate erred in law and fact in failing to find liability in respect to the respondent and also failing to award any damages and appreciate the nature and causes of the injuries occasioned to the appellant. The appellant sustained serious injuries as evidenced by the medical report by Dr. G. K. Mwaura but the same was not considered in the conclusion of the suit by the learned magistrate.

14. In ***Selle & Another vs Associated Motor Boat Co. Limited & Others [1968] EA 123*** stated the duty of the court in a first appeal to be as follows:

> **"I accept counsel for the respondent's proposition that this court is not bound necessarily accept the findings of fact by the court below. An appeal to this 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 Hammed Saif vs Ali Mohamed Sholan [1955], 22 EACA 270."**

15. Grounds (d) and (e) raises the question of the evidence adduced and whether the appellant had proved his case on a balance of probability. The evidence adduced was proved on a balance of probability and in fact the same was never challenged by the respondent.

16. ***HMB Kayondo vs Somani Amirali Kampala HCCC No. 183 of 1994 [1995] IV KALR 78*** that, ***"the proper way on how one should consider the evidence at the conclusion of the case is to weigh the evidence given by the respondent against that given by the appellant and to decide the case according to the provisions of section 3 of the Indian Evidence Act which provides that, "a fact is said to be proved when after considering the matter before it the court either believes it exist or considers its existence so probable that a prudent man ought under the circumstances of the particular case to act upon the supposition that it exists. In other words, it at the end of the case, the court considers that there is a preponderance of evidence in favor of the respondent, a decision in favor of the respondent should result and conversely if the preponderance is in favor of the appellant."***

17. Section 107(1) of the Evidence Act, Cap 80 Laws of Kenya provides:

> **"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**
>
> **The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person."**

18. This position was re-affirmed by the Court of Appeal in ***Maria Ciabaitaru M'mairanyi & Others vs Blue Shield Insurance Company Limited Civil Appeal No. 101 of 2000 [2005] 1 EA 280*** where it was held:

> ***"Whereas under section 107 of the Evidence Act, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be case on the person who wishes the court to believe in its existence."***

19. As was held in ***Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another Civil Appeal No. 345 of 2000 [2005] 1 EA 334:***

> **"As a general proposition under section 107(1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden**

that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in section 109 and 112 of the Act. In this case the appellants' case was that they were never notified of the meeting at which the resolution was passed. The respondents while insisting that there was in fact such a notice were unable to produce the same. In effect the appellants were alleging a negative. Since it was the respondents who were alleging a positive, pursuant to section 109 of the Evidence Act, it was upon them to prove that there was in fact such a notice. As was held by Seaton, JSC in the Uganda case of JK Patel vs Spear Motors Ltd SCCA No. 4 of 1991 [1993] VI KALR 85:

> **"The proving of a negative task is always difficult and often impossible, and would be a most exceptional burden to impose upon a litigant. The burden of proof in any particular case depends on circumstances in which the claim arises. In general the rule which applies is *ei qui affirmat* not *ei qui negat incumbit probatio*. It is an ancient rule founded on considerations of good sense and it should not be departed from without strong reasons... As applied to judicial proceedings the phrase "burden of proof" has two distinct and frequently confused meanings, (1) the burden of proof as a matter of law and pleading – the burden, as it has been called, of establishing a case, whether by preponderance of evidence, or beyond reasonable doubt; and (2) the burden of proof in the sense of adducing evidence..... The onus *probandi* rests, before evidence is gone into, upon the party asserting the affirmative of the issue; and it rests, after evidence is gone into, upon the party against whom the tribunal, at the time the question arises, would give judgment if no further evidence were adduced." See Constantine Steamship Line Ltd vs Imperial Smelting Corp [1914] 2 ALL 165 (H.L); Trevor Price vs Kelsall [1975] EA 752 at 761; Phippson on Evidence 12th Ed Para 91; Phippson at para 95."**

EVIDENCE ADDUCED:

20. The appellant testified that on 29th October 2011 he was working for the respondent and while removing steel metals a metal plate measuring one tone fell on him hitting his rib. He said that he lost consciousness on being hit. He was taken to Reuben Clinic where he was referred to Mbagathi Hospital for treatment.

21. He produced the referral letter in court as exhibit. Appellant said that x-ray was done at Mbagathi Hospital. He produced the x-ray and x-ray report in court as exhibits. He produced receipt of Kshs.2000 for the x-ray. Appellant was later examined by Dr. G. K. Mwaura who wrote medical report. He paid Kshs.2000/= for the medical report. He identified the medical report in court and produced receipt for 2000 in court as exhibit.

22. In cross examination the appellant said that he was employed by a contractor contracted by the respondent; and that the person who was driving the crane was his fellow employee by the name Chalo. He said he was paid by the said contractor called Kiedi and not the respondent herein.

23. He said that the engineers giving them instructions were from the respondent company. Dr. Mwaura confirmed that he examined the appellant and found that he sustained a blunt injury to the back causing multiple fractures to the 2nd, 3rd and 4th lumber spine vertebrae (back bones). He found that he was unable to bend and that the pain was likely to persist for 6 months.

24. Defence availed one witness Allan Imbti Madala a claims officer for the respondent company. He said that the appellant was never employed by the respondent but worked under a sub-contractor. He said that injured employees report to him to be referred to Likoni Clinic and Kenyatta National Hospital.

25. He produced a register for injuries in court and said that there is no injury that relate to the appellant herein. He said employees sign master roll which he showed court and said it doesn't have appellants name. He said appellant never worked for respondent and that all employees are issued with protective gadgets. He said that the respondent was not paying the appellant for services rendered.

26. In cross examination DW1 said that he is the one who recruits employees and sign their contracts. He said that the appellant was employed by a sub-contractor.

The issues:

27. After going through evidence, pleadings and parties submissions, I find the singular is; whether **the appellant was the Respondent's employee?**

Analysis and determination:

28. **Section 107(1) of the Evidence Act, Cap 80 Laws of Kenya provides:**

> ***"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***
>
> ***The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person."***

29. As was held in ***Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another Civil Appeal No. 345 of 2000 [2005] 1 EA 334:***

> ***"As a general proposition under section 107(1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who***

> ***invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in section 109 and 112 of the Act"***

30. In civil case ***No. 626 of 1987 – Mwanthi vs Mbwana Construction limited*** where the appellant was hired by a sub-contractor, it was held that**,**

> ***"The onus of prove on whether or not a person has been employed lie on.......the test whether the alleged servant was under control or and bound to obey the orders of the alleged master; if he is then the relation of master and servant exists...."***

31. The appellant said that he was employed by a contractor contracted by the respondent; and that the person who was driving the crane was his fellow employee by the name Chalo. He said he was paid by the said contractor called Kiedi and not the respondent herein.

32. Defence availed one witness Allan Imbti Madala a claims officer for the respondent company. He said that the appellant was never employed by the respondent but worked under a sub-contractor. He said that injured employees report to him to be referred to Likoni Clinic and Kenyatta National Hospital.

33. He produced a register for injuries in court and said that there is no injury that relate to the appellant herein. He said employees sign master roll which he showed court and said it doesn't have appellants name. He said appellant never worked for respondent and that all employees are issued with protective gadgets. He said that the respondent was not paying the appellant for services rendered.

34. In cross examination DW1 said that he is the one who recruits employees and sign their contracts. He said that the appellant was employed by a sub-contractor.

35. In view of the aforesaid pieces of evidence, it is manifestly clear that the respondent was not the employer of the appellant thus not liable. Thus the trial court was justified in arriving at the decision it arrived at.

> ***i. This court thus finds no merit in the appeal and dismisses the same with costs to the respondent.***

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF NOVEMBER, 2019.

C. KARIUKI

JUDGE