



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 173 OF 2013

WOOD PRODUCTS (K) LIMITED.....APPELLANT

AND

NELSON BARASA WASIKE.....RESPONDENT

(An Appeal from the Judgement of the Chief Magistrate's Courts,

Nairobi (Mr. C. Obulusta, S.P.M. dated 12th March 2013

in Milimani Commercial Civil Suit No. 1413 of 2011)

JUDGMENT

The respondent sued the appellant in the lower court for damages arising from injuries sustained in the course of employment. He blamed the appellant for the said injuries in that it failed to provide proper equipment or safe systems of work. The appellant denied the claim by stating that the claim was governed by the Employment Act and Labour Institutions Act and therefore the trial court had no jurisdiction to entertain the same.

In the alternative the appellant denied that it employed the respondent as a carpenter but that he was an employee of a sub-contractor known as David Masawe. The injuries sustained were also denied and blame was attributed to the respondent's negligence particulars of which were set out.

After a full trial, the trial court found in favour of the respondent and made an award of Kshs. 150,000/= general damages plus Kshs. 4,750/= special damages. The appellant was aggrieved by the said judgment and lodged this appeal setting out several grounds contained in the Memorandum of Appeal.

It is their case that the respondent did not prove his case on a balance of probabilities and that the court was wrong to infer a contract of employment from a delivery note, and also holding that the respondent sustained injuries in the course of his employment contrary to the evidence adduced by defence witnesses. The court was also faulted for ignoring the appellant's pleadings, evidence and submissions to the effect that the respondent was employed by an independent contractor one Mr. David Masawe and therefore there was not privity of contract between the appellant and the respondent; therefore the appellant did not owe the respondent any duty of care. Finally, the lower court was faulted for awarding the sum of Kshs. 150,000/= for a minor blunt injury to the back.

It is the appellant's prayer that the lower court finding on liability be set aside and that this court holds the respondents did not prove his case on a balance of probabilities. It is also its prayer that the award of general and special damages be set aside and the suit dismissed with costs.

Both parties filed written submissions to argue the appeal and cited some authorities. In finding for the respondent, the lower court had the following to say,

“If indeed Masawe was an independent contractor, there was nothing to show as such since the plaintiff says in fact that the defendant was their supervisor. Whereas the defendant says they have a list of contractors, they did not produce any or a list of their employees to confirm that the plaintiff was not one of them.

If the defendant thought they had been wrongly sued, they were the ones to apply to have David Masawe enjoined as a 3rd party for purposes of indemnity and or contribution. They failed to do so. On a balance of probability the court is satisfied that the plaintiff has established he is an employee of the defendant. He has explained how the incident happened and none

of the defendants witness challenged that testimony. On a balance of probability the court finds liability in full against the defendant.”

As is required of an appellate court, I have made an evaluation of the evidence adduced before the lower court. It is true that where a person is engaged by an independent contractor and suffers any injury in the course of that engagement, he cannot sue the principal who engaged the independent contractor. Decided cases have held that his cause of action is against the independent contractor. - see HCC No. 325 of 2005 South Nyanza Sugar Company Limited vs. Caleb Onyambo (2010) e KLR.

It is also a cardinal principle that whoever alleges existence of a particular fact has a duty to prove the said fact. This is also the thrust and requirement set out in Section 107 of the Evidence Act, Cap 80 Laws of Kenya.

Every employer keeps a record of employees and this did not exclude the appellant herein. If the respondent was not its employee, the easiest thing to do was to produce the register to confirm this.

The evidence advanced by the respondent weighed against that of the appellant relating to his engagement, clearly outweighs that of the appellant on a balance of probability and therefore it is my finding that he was an employee of the appellant as opposed to that of the subcontractor.

The respondent was blamed for negligence leading to his injuries but again he established that the person detailed to help him by holding the door while attending to the it was overwhelmed. The appellant knew or ought to have known the weight of the said door to deploy more personnel in the circumstances. This was not done.

I cannot assign any negligence on the part of the respondent. The lower court finding on liability was therefore correct.

The respondent sustained injuries more particularly set out in the medical report produced in evidence by Doctor Wangata. The appellant was injured on the lumbar spine due to muscular spasm. X-rays showed the same and even at his examination several months later he still had pains. The injury was categorized as a soft tissue injury leading to disability on the limbs and spine. The doctor observed that there was loss of lumbar lordosis due to muscular spasm. He had developed arthritis. Permanent incapacity was assessed at 5 %.

In awarding Kshs. 150,000/= general damages the trial court relied on cited authorities and took into account inflation. I have considered those authorities. The lower court did not apply wrong principles neither is the award inordinately too high to attract interference by this court. I have no reason to do so. Accordingly, this appeal is dismissed with costs to the respondent.

Dated, signed and delivered at Nairobi this 18th day of April, 2018.

A. MBOGHOLI MSAGHA

JUDGE