



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**CIVIL APPEAL NO 225 OF 2016**

**ALOONA COMPANY LIMITED.....APPELLANT**

**VERSUS**

**MUSILI MWANZA.....RESPONDENT**

**(Being an appeal from the Judgment of Hon C. Obulutsa (Mr), Senior Principal Magistrate (SPM) at the Chief Magistrate's Court at Milimani in Civil Case No 4659 of 2011 delivered 30<sup>th</sup> April 2015)**

**JUDGMENT**

**INTRODUCTION**

1. In his Judgment of 30<sup>th</sup> April 2015, the Learned Trial Magistrate, C. Obulutsa (Mr), Senior Principal Magistrate (SPM) entered judgment in favour of the Respondent in the sum of Kshs 351,500/= made up as follows:-

**General damages      Kshs 350,000/=**

**Special damages      Kshs    1,500/=**

Plus doctors attendance fees, costs of the suit and interest.

2. Notably, the Decree given on 30<sup>th</sup> April 2015 did not appear to have captured the doctor's attendance fees.

3. Being dissatisfied with the said judgment, on 3<sup>rd</sup> May 2016, the Appellant filed its Memorandum of Appeal of even date. It relied on nine (9) Grounds of Appeal. The Appellant's Supplementary Record of Appeal were dated 25<sup>th</sup> June 2016 and filed on 26<sup>th</sup> June 2018. The Appellants Written Submissions and List of Authorities both dated 8<sup>th</sup> June 2018 and filed on 11<sup>th</sup> June 2018. The Respondent's Written Submissions were dated 20<sup>th</sup> June 2018 and filed on 25<sup>th</sup> June 2018.

4. When the matter came before the court on 27<sup>th</sup> June 2018, the parties requested that the court deliver its decision based on their respective Written Submissions which they relied upon in their entirety. The Judgment herein is therefore based on the said Written Submissions.

**LEGAL ANALYSIS**

5. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand.

6. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd[1968] EA 123** and **Peters vs Sunday Post Limited [1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

**“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”**

7. Having looked at the parties' Written Submissions and case law that they each relied upon, it appeared to this court that the issues that had

been placed before it for its determination were:-

- 1. Whether or not the Respondent was the Appellant's employee at the time he sustained the injuries;**
- 2. Whether or not the Appellant was liable in negligence for the Respondent's and if so, to what extent; and**
- 3. Whether or not the general damages awarded by the Learned Trial Magistrate were manifestly excessive warranting interference of this court.**

8. This court found it prudent to interrogate the first issue hereinabove because need to analyse the other two (2) issues was dependant on whether its answer would be in the affirmative.

9. The Appellant submitted that although the Respondent had contended during trial that he was its employee and that Mr. Kyalo (PW 3) had corroborated his evidence, neither of them adduced any documentary evidence to prove that the Respondent was in fact its employee.

10. On his part, the Respondent argued that he was never issued with any staff card or any document that would have proven that he was an employee of the Appellant. It was his assertion that the duty to keep such documentation lay with the Appellant and not with him as was envisaged in Section 74 (1) of the Employment Act Cap 226 Laws of Kenya.

11. It was his further submission that Section 8 of the Employment Act permitted oral contracts between an employer and an employee and consequently PW 3's corroboration of his evidence that on 8<sup>th</sup> July 2010 he was on duty at the Appellant's premises when he sustained injuries, was sufficient to prove that he was the Appellant's employee.

12. The court perused the proceedings and noted that in his Complaint dated 5<sup>th</sup> October 2011 and filed on 6<sup>th</sup> October 2011, the Respondent stated that on the material date he sustained injuries, he was the Appellant's employee. He reiterated the same fact in his Witness Statement that was also dated 5<sup>th</sup> October 2011. He relied on the said Witness Statement as his evidence.

13. PW 3 also adopted his Witness Statement dated 19<sup>th</sup> February 2016 as his evidence in chief. He also stated that he and the Respondent were employees in the Appellant's company.

14. In its Statement of Defence dated 16<sup>th</sup> November 2011 (**sic**) and filed on 15<sup>th</sup> December 2011, the Appellant denied that the Respondent was its employee. It filed a Witness Statement of Harpreet Singh Lotay dated 27<sup>th</sup> September 2013 on 10<sup>th</sup> October 2013 where he denied that the Respondent was the Appellant's employee. In his Witness Statement of Raphael Muthama (hereinafter referred to as "DW 1") dated 27<sup>th</sup> September 2013 and filed on 10<sup>th</sup> October 2013, which he also adopted as his evidence in this case, DW 1 also denied that the Respondent was the Appellant's employee. Francis Ng'ang'a's (hereinafter referred to as "DW 2") Witness Statement was also dated 27<sup>th</sup> September 2013 and filed on 10<sup>th</sup> October 2013. He also adopted the same as his evidence in this case. He denied that the Respondent was the Appellant's employee.

15. It was evident that on the question of whether or not the Respondent was the Appellant's employee, it was a case of one person's word against the other. This put this court in a very difficult position in ascertaining who was speaking the truth and who was not.

16. In his Judgment, to arrive at a determination of whether or not the Respondent was an employee of the Appellant, the Learned Trial Magistrate stated that the Respondent called a witness to corroborate his evidence that he was an employee of the Appellant. He pointed out that the Appellant failed to produce documents for July 2010 which were for the relevant period.

17. This court found fault in this finding. Firstly, the Learned Trial Magistrate shifted the burden of proof to the Appellant to prove that the Respondent was not its employee. It is trite law that he who asserts must prove. The onus to prove that there was an employee- employer relationship remained with the Respondent herein at all material times. Such proof need not be documentary it must be proof that can be demonstrated by evidence that is adduced in court.

18. Secondly, the Learned Trial Magistrate erred when he relied on the Witness Statement of Harpreet Singh Lotay because he was not called to testify. His Witness Statement remained just that, a mere Witness Statement because he did not take oath so that it could be adopted as his evidence-in-chief.

19. The Learned Trial Magistrate misdirected himself by relying on the evidence of the said Harpreet Singh Lotay and DW 1 that there was an on-going construction at the Appellant's premises to conclude that the Respondent was the Appellant's employee and that he sustained injuries in the course of his employment.

20. This court's reasoning was that if the Learned Trial Magistrate considered the evidence of Harpreet Singh Lotay to have been pertinent, he erred and misdirected himself because the Appellant could not have been found liable for negligence of an independent contractor on its site.

21. In addition, from DW 2's evidence, the Appellant company dealt with retreading of tyres which was corroborated by the Witness Statement of Harpreet Singh Lotay who had indicated that the Appellant was in the business of tyre retreading, which statement the Learned Trial Magistrate relied upon. The Learned Trial Magistrate could not have accepted some aspects of the statement of Harpreet Singh Lotay and ignored others.

22. Whilst this court was persuaded by the evidence of the Respondent, PW 1 and DW 2 to find and hold that there was a construction going

on at the Appellant's premises, it found that there was a gap in the evidence of how the Appellant became liable for the injuries that the Respondent sustained.

23. The onus was on the Respondent to have demonstrated that the Appellant was involved in the construction more so because its primary business was retreading of tyres. Notably, in his Cross-examination, DW 2 stated that Oxen Contractors were on their premises expanding the Appellant's buildings. The Appellant could not have been liable for negligence caused by an independent contractor.

24. Thirdly, the Respondent's evidence of the period he was in the Appellant's employment was also sketchy. In his Witness Statement, he stated as follows:-

**“On 8<sup>th</sup> July 2010, I was working at Aloona Company where I was employed. I was building when I fell...”**

25. He did not expound on when he was employed or what duties he had been employed to do. It was important for him to have presented cogent evidence because he could also have fallen from a ladder while on a frolic of his own or doing work that he had not been assigned. He needed to have demonstrated that he had been an employee at the Appellant's company and that he had been assigned to work at the construction site.

26. Accordingly, having considered the evidence that was adduced in court, the parties Written Submissions and the case law they each relied upon, this court came to the firm conclusion that the Respondent did not prove on a balance of probability that he was an employee of the Appellant. It was immaterial that the Appellant did not produce its records for July 2010 because the onus was not on them to prove that the Respondent did not work at its premises. It was for the Respondent to have adduced sufficient evidence to prove this fact.

27. Appreciably, this was a case of parties being on opposite sides of a pole therefore leaving the court to look for cogency in the case to determine which way it should rule.

28. In view of the aforesaid determination, there was no value in determining whether or not the Appellant herein was liable in negligence for the injuries that the Respondent sustained or whether or not the damages that were awarded by the Learned Trial Magistrate were manifestly and inordinately high to have warranted interference by this court.

#### **DISPOSITION**

29. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged in court on 3<sup>rd</sup> May 2016 was merited and the same is hereby allowed. The Respondent will pay the Appellant's costs of this Appeal.

30. The effect of this judgment is that the judgment that was entered in favour of the Respondent against the Appellant on 30<sup>th</sup> April 2015 by the Learned Trial Magistrate for General damages in the sum of Kshs 350,000/=, Special damages in the sum of Kshs 1,500/=, the doctor's attendance fees, costs of the suit and interest thereon is hereby set aside and/or vacated. The Respondent's suit that was filed on 6<sup>th</sup> October 2011 is hereby dismissed with costs to the Appellant. The Respondent will also bear the Appellant's costs of this Appeal.

31. Orders accordingly.

**DATED and DELIVERED at NAIROBI this 18<sup>th</sup> day of October 2018**

**J. KAMAU**

**JUDGE**