REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 141 OF 2015

(Coram: Odunga, J)

ASWA DEVELOPERS & CONTRACTORS LIMITED.....APPELLANT

VERSUS

LINOS NGORERE OKUYU.....RESPONDENT

(Being an appeal from the judgment of the Chief Magistrate at Machakos Hon. M K Mwangi, SRM delivered on 14th August, 2015 in Machakos CMCC No. 275 of 2013)

BETWEEN

LINOS NGORERE OKUYU.....PLAINTIFF

VERSUS

ASWA DEVELOPERS & CONTRACTORS LIMITED.....DEFENDANT

JUDGEMENT

1. By a plaint dated 27th March, 2013, the Respondent herein instituted a suit against the Appellant herein claiming Special Damages in the sum of Kshs 3,000/- General Damages, Costs and interests and any other or relief the Court would deem fit to grant.

2. The Respondent's suit was premised on the fact that the Respondent was an employee of the Appellant. On or about the 21st December, 2012 while the Respondent was in the course of his lawful duties at the Appellant's premises on the instructions of the appellant, it was alleged that the Appellant provided the Respondent with unsafe system of work and while the respondent was carrying building stones, he trampled and fell and sustained serious injuries on the back and the nose as a result of which he suffered pain and loss.

3. It was the Respondent's case that the said accident was caused by the negligence, carelessness, breach of statutory duty and breach of contract on the part of the Appellant particulars whereof he outlined. It was due to the foregoing that the Respondent instituted these proceedings.

4. In his witness statement, the Appellant stated that he was employed by the Appellant herein on 17th December, 2012 on casual basis and was assigned to the general department. However on 21st December, 2012 at around 10.30 am he was carrying building stones while the supervisor was besides then giving instructions to work faster when due to the speed he was walking at, he slid and fell down and the stone he was carrying hit his face. As a result be sustained injuries on his back and nose and lost consciousness. He later regained consciousness after he was given first aid and the personnel ordered him to go home. However due to the injuries he sustained, he decided to go to the hospital and he was attended to at Site medical and Skin Diseases Clinic where he was treated and discharged. In his statement he stated that he was still experiencing problems on his back and blamed the Appellant for not providing him with protective gear.

5. In his evidence in court, the Respondent testified that on the said date he was working for the Appellant though he had no employment ID. In the morning of that day the four of them were carrying construction stones on their shoulders for a bridge. However when he stepped on one of the said stones, the same was loose as a result of which he fell and he was injured by big stones including the one he was carrying. At about 3.00 pm he was asked to go home and get treatment. It was his evidence that he was injured on the legs, shoulder and nose. He obtained treatment from Athi River Site Medical Clinic and was given 3 days rest. He was later seen by **Dr Mwaura** who examined him and prepared a report. It was his evidence that he was still having pain on his nose and bled often. Later he was laid off. He exhibited his medical treatment chit as evidence.

6. According to him the Appellant was to blame for failing to give him boots and helmet which would have prevented his injury.

7. In cross-examination the Respondent stated that he was employed by the Appellant in August, 2012 and worked for the Appellant till December of that year when he got injured. It was his evidence that he used to be paid salary by a supervisor known as **Mr Irungu**, while one **John Kuria**, the manager, would regulate the payment. It was his evidence that when he got injured, he was taken to the office of the said Manager who was superior to the supervisor. The Respondent however insisted that he was employed by the Defendant through the said Manager and that he was working in the Defendant's premises. In his understanding the foreman and **Mr Irungu** were the Appellant's employees.

8. In its statement of defence the Appellant denied that it was the Respondent's employee and that he had any contractual relationship with the Respondent. It was therefore its position that it did not owe any duty of care to the Respondent. According to it, it never enters into any contracts with any casual employees for construction works as its entire works are usually sub contracted to other contractors who employ their own employees and it therefore never employed the Appellant. It was therefore not aware of the accident and cannot be liable to the Respondent. The particulars of negligence and injuries were therefore denied and the Appellant denied any liability to the Respondent and sought that the suit be dismissed with costs.

9. In support of its case, the Defendant called its supervisor, **Edward Kamau**. According to his witness statement, at the time the Respondent alleged that he had been employed by the Appellant, he was working with the Appellant as its supervisor. He however stated that the plaintiff was not an employee of the Appellant Company as the company did not usually employ any casual labourers for its construction sites as it used to subcontract the works and it was the subcontractors who went with their employees for any assignment they were undertaking. It was disclosed that that specific site had 8 subcontractors undertaking various works each of whom employed its own workers to undertake their specific tasks. It was therefore stated that the subcontractors paid their own employees and were responsible for their needs and the Appellant paid the subcontractors based on the measurements of the work done but nothing over and above that. It was the subcontractors to decide the number of employees they required and their pay.

10. It was therefore contended that the Appellant neither had any contractual relationship with the Respondent nor did it owe the Respondent any duty of care hence the claim against the Appellant was misplaced.

11. In his oral evidence, the witness reiterated the foregoing and exhibited sub-contractors contracts between the Appellant and **Faith Muendo**, **John Kuria**, **Joseph Mulwa**, **Steve Ndegwa** among others.

12. In cross-examination, the witness stated that the Appellant was supervising all the scenes and that they did not have a list of the employees of the subcontractors. He also did not have a list of the Appellant's employees. According to him, they did not have any monies at the site.

13. In his judgement, the Learned Trial Magistrate found that the Appellant had produced a medical report showing that he was indeed injured and that the Appellant did not produce a list of its employees yet such a list existed. The Trial Court therefore found the Respondent's case probable on a balance of probabilities.

14. According to the Learned Trial magistrate, the Appellant was under obligation to accord the Respondent a safe system of work and by allowing him to work on unstable ground and failing to give him a helmet and boots given the nature of the Respondent's work the Appellant exposed the Respondent to danger thereby breaching his duty as an employer and was hence negligent.

15. The Court however found that as the Respondent was aware of the danger he was exposed to, he ought to have exercised grater care than he did in ensuring his safety and was hence partly to blame. The Court assessed the Respondent blame at 15% and that of the Appellant at 85%. He then proceeded to assess the general damages in the sum of Kshs 150,000.00 and awarded Kshs 3,000/= as special damages. He also awarded him costs.

16. In this appeal it is the appellant's case that **John Kuria** was appointed a subcontractor by the Appellant and that the subcontract was clear that a subcontractor was to provide labour only to carry out the stated works. It was submitted that under section 107 of the ***Evidence Act***, the Respondent was obliged to demonstrate that the Appellant was indeed his employer but this the Respondent failed to do. It was further submitted that the Trial Court instead placed this burden on the Appellant. In support of its appeal the Appellant relied on ***Halsbury's Laws of England*** and **South Nyanza Sugar Co. Ltd vs. Daniel Odek Matoka [2011] eKLR**.

17. In opposing the appeal, the Respondent submitted that there is no dispute that the respondent was injured while working on the appellant's premises, the main issue for determination is whether the Respondent was an employee of the appellant or of the alleged sub-contractor. The Respondent relied on NBI HCCA 599 of 2011 - **Giaki Holdings Ltd vs. Jackson Kadenge Ofenyi**.

18. It was submitted that in the instant matter, the appellant herein, failed to produce a register of employees from the Appellant's company, to confirm indeed the plaintiff was not an employee of the Appellant, yet the Appellant's witness confirmed availability of the said register, further the appellant, failed to call **Mr. John Kuria**, the alleged subcontractor to confirm whether the plaintiff was his employee or not. The Respondent also relied on ELD HCCA 7 of 2003 - **CPC Industrial Products (K) Limited vs. Samuel Kirwa Kosgei.**

19. It was submitted that in the instant matter, **Mr Irungu**, the supervisor of the respondent at the appellant company never testified as to whether he was an employee of the appellant company or the subcontractor, it was the evidence of the respondent that **Mr Irungu** was an employee of the Appellant company and was responsible for supervising work at the Appellant's premises.

20. It was the Respondent's submission that it is clear from the evidence on record that the plaintiff was injured in the premises of the appellant, under the supervision of an employee of the appellant company, hence it is our submission that it should be held liable for the injuries occasioned to the respondent.

21. According to the Respondent's submissions, the respondent was not aware of the term of the alleged sub contract between the defendant

and **Mr Kuria**, secondly the produced sub contract does not indicate that the subcontractor had the task of assigning and supervising the work, and finally, no evidence was actually adduced to the effect that the respondent was an employee of the subcontractor.

22. It was therefore submitted that the Respondent proved his case on a balance of probabilities during trial and the Court was urged to find that this Appeal lacks merit and the same be dismissed in its entirety with costs to the Respondents.

Determination

23. I have considered the submissions of the parties in this appeal. It is clear that the only issue for determination in this appeal is whether on the evidence adduced before the Trial Court the Respondent proved that he was an employee of the Appellant. This being a first appellate court, it was held in **Selle vs. Associated Motor Boat Co. [1968] EA 123** that:

> **"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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 the 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."**

24. Therefore this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties.

25. However in **Peters vs. Sunday Post Limited [1958] EA 424,** it was held that:

> **"Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given…Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question…It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."**

26. However in **Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278** the Court of Appeal held that:

> **"A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."**

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

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.

28. This is called the legal burden of proof. There is however evidential burden of proof which is captured in sections 109 and 112 of the same Act as follows:

> ***109. 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 that fact shall lie on any particular person.***

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

29. The two provisions were dealt with in **Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another [2005] 1 EA 334,** in which the Court of Appeal held that:

> **"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 sections 109 and 112 of the Act."**

30. It follows that the initial burden of proof lies on the plaintiff, the respondent in this appeal, but the same may shift to the defendants, the appellant in this appeal depending on the circumstances of the case.

31. In this case, the Respondent's evidence was that he was employed by the Appellant. That he was working within the Appellant's premises is not in doubt. It is also not in doubt that the Appellant was the main contractor of the work that the Respondent was undertaking. In the Respondent's submission the people who assigned him duty and those who supervised him were the supervisor known as **Mr Irungu** and the manager, **John Kuria**, were doing so under the instruction and authority of the Appellant. In other words he had no reason to believe that they were doing so as subcontractors. As was opined by **Dulu, J** in ELD HCCA No. 7 of 2003 - **CPC Industrial Products (K) Limited vs. Samuel Kirwa Kosgei**:

> **"There is no evidence that the respondent was aware of the terms of the agreement between the appellant and Copan Agencies Limited."**

32. In those circumstances, it is my view that the evidential burden then shifted to the Appellant to prove that in fact the Respondent was an employee of the subcontractors who were independent from the Appellant. In an attempt to do so, the Appellant relied on a purported subcontract between the Appellant and **John Kuria**. While that document was in the bundle of documents filed by the Appellant nowhere in the proceedings was it admitted or produced as an exhibit. Order 14 rule 1(1) of the ***Civil Procedure Rules*** provides that:

> ***Subject to subrule (2), there shall be endorsed on every document which has been admitted in evidence in the suit the following particulars—***
>
> ***(a) the number and title of the suit;***
>
> ***(b) the party producing the document;***
>
> ***(c) the date on which it was produced; and***
>
> ***the endorsement shall be signed or initialled by an officer of the court.***

33. Nowhere is it indicated that the defendant/appellant's bundle of documents were admitted as evidence and they were similarly not marked. In my view documents filed by a party with the pleadings do not automatically become evidence in the case until and unless they are formally admitted as such by the Court. From the proceedings the only document that was marked was the witness statement by DW1. In the premises the said subcontract had no evidential value.

34. Apart from that the said subcontractor was never called to shed light on the allegation by the Appellant that the Respondent was not employed by the Appellant. I agree with the views expressed by **Sergon, J** in NBI HCCA 599 of 2011 - **Giaki Holdings Ltd vs. Jackson Kadenge Ofenyi** that:

> **"After a careful consideration of the competing evidence, I am unable to comprehend why the Appellant failed to summon Mr Omondi to testify to confirm whether or not he employed the respondent to paint the Appellant's premises. DW 1 further failed to tender evidence showing that Mr Omondi had actually employed the respondent. In the end, I am convinced that the decision by the Learned Senior Principal Magistrate cannot be faulted. The Trial Magistrate therefore arrived at the correct decision."**

35. It is similarly my view that in the absence of a properly admitted subcontract and evidence from the Respondent's purported employer, the subcontractor, there is no justification for me to interfere with the Learned Trial Magistrate's finding of fact that the Respondent was employed by the Appellant. As was held by the Court of Appeal in **Mohammed Mahmoud Jabane vs. Highstone Butty Tongoi Olenja Civil Appeal No. 2 of 1986 [1986] KLR 661; Vol. 1 KAR 982; [1986-1989] EA 183:**

> **"Unless it is shown that the learned Judge took into account facts or factors which he should not have taken into account, or that he failed to take into account matters which he should have taken into account, that he misapprehended the effect of the evidence, or that he demonstrably acted on wrong principles in making his findings, the appellate court will not interfere with the findings of facts."**

36. I am not satisfied that that threshold has been met by the Appellant in this appeal.

37. Consequently this appeal has no merit, the same fails and is dismissed with costs to the Respondent.

38. Orders accordingly.

Read, signed and delivered in open Court at Machakos this 27th day of November, 2018

G V ODUNGA

JUDGE

Delivered the presence of:

Mr Omondi for Mr Mulanga for the Appellant

CA Geoffrey