



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 599 OF 2011

GIAKI HOLDINGS LTD..... APPELLANT

V E R S U S

JACKSON KADENGE OFENYI RESPONDENT

(Being an appeal from the judgement and decree of the chief Magistrate's court at Milimani Commercial Courts (S.A. Okato P.M) made on 28th October 2011 in Milimani CMCC No.7979 of 2009)

JUDGEMENT

1. Jackson Kadenge Ofenyi, the Respondent herein, sued Giaki Holdings Ltd, the Appellant herein, vide the plaint dated 16.11.2009 whereof he sought for **inter alia** general and special damages for the injuries he suffered while in the course of the employment of the Appellant. The Respondent claims that he was employed by the Appellant as a painter since 2001. He alleged that while in the course of performing his duties as a painter the ladder he was using fell down and injured his arm at the wrist. He attributed the accident to the negligence of the Appellant. The Appellant denied the Respondent's claim by filing a defence. The Appellant also denied that the Respondent was his employee. Hon. S. A. Okato, learned Senior Principal Magistrate heard the case and in the end he gave judgement in favour of the Respondent and against the Appellant in the sum of ksh.184,000/=. The Appellant was aggrieved by the decision hence it preferred this appeal.
2. On appeal, the Appellant put forward the following grounds of appeal:
 1. *The learned magistrate erred in preferring the plaintiff's evidence to that of the defendant/Appellant.*
 2. *The learned magistrate erred in holding and finding that the plaintiff was an employee of the defendant/Appellant whilst no evidence was adduced to support that finding.*
 3. *The learned magistrate erred in not holding as a fact that the defendant/Appellant had employed an independent contractor to carry out the painting and who was not under its control.*
 4. *The learned magistrate erred in not holding that in law, the principal/Appellant is not liable for the actions and torts of an independent contractor.*
 5. *The learned magistrate erred in finding and holding that the defendant/Appellant was negligent in the circumstances of the case.*
3. When the appeal came up for hearing, learned counsels appearing in the matter recorded a consent order to have the appeal disposed of by written submissions. I have re-evaluated the case that was

before the trial court. I have further considered the rival written submissions plus the authorities cited. Though the Appellant put forward a total of five (5) grounds of appeal those grounds may be summarised to two main grounds namely:

First, that the learned Senior Principal Magistrate erred when he ruled that the Respondent was an employee of the Appellant as opposed to being an independent contractor. Secondly, that the learned Senior Principal Magistrate erred when he found that the Appellant was negligent and liable to compensate the Respondent for the injuries.

4. On the first ground as to whether or not the Respondent was an employee, it is the submissions of the Appellant that the learned Principal Magistrate erred in holding that the Respondent was an employee of the Appellant yet the Respondent had failed to produce any documentary evidence to prove that finding. The Appellant further argued that the mere knowledge of the Respondent by the Appellant's manager was not sufficient proof that the Respondent was an employee of the Appellant. The Appellant further argued that the trial magistrate ignored the evidence of the Appellant's witness who clearly stated that Mr. Omondi would be contracted whenever there was painting to be done. The Appellant argued that the trial ought to have found that the Respondent was an independent contractor and therefore ought to have taken into account any factors relating to the control the Appellant exercised over the Respondent while discharging his duties as a painter. It was pointed out that the Respondent was independently contracted by Mr. Omondi an independent contractor.
5. The Respondent is of the view that he was an employee of the Appellant. He stated that he was not issued with an employment letter nor card since he was a casual labourer earning ksh.450/= per day.
6. I have carefully considered the material placed before me. There is no dispute that the Respondent got injured while painting the Appellant's premises. The question which must be answered is whether the Respondent was employed by the Appellant or was he employed by a Mr. Omondi who was alleged to have been an independent contractor hired by the Appellant. It is evidence of the Respondent that he was employed as a casual labourer earning kshs.450/= per day. He also stated that he was not issued with a letter of employment by the Appellant. Joseph Njoroge Waithumi (DW1) testified in support of the Appellant's case. He told the trial court that whenever the Appellant wanted to paint the houses tenants have vacated the Appellant usually gives the work to a painter who has done so for it for many years. D.W.1 said Mr. Omondi did the work and was paid. He claimed that Mr. Omondi employed the Respondent herein and not the Appellant. 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. DW1 further failed to tender evidence in form of the contract signed between the Appellant and Mr. Omondi. The Appellant also 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.
7. The second ground is whether or not the Appellant was negligent. It is the submission of the Appellant that since there was no binding contract between the parties to this dispute, no apportionment of liability can arise therefore there was no duty of care. The Appellant also stated that the work of painting is inherently dangerous and therefore the same requires a very high standard of care which cannot be delegated as alluded by the Respondent. I have carefully re-evaluated the evidence tendered by the Appellants only witness. In cross-examination D.W.1 admitted that he did not provide any cap, security belt and a helper to the Respondent or any other painter for that matter. The Appellant failed to present records of persons injured on the material date. The employer's duty is to take reasonable care in common law is to take reasonable care for the safety of his employees in the circumstances so as not to expose them to unnecessary risk. I am convinced that the Appellant cannot escape liability in this saga. The Respondent told the trial court that he was alone when he climbed the ladder. He said he slipped and fell down. He stated

that the Appellant did not assign anyone to hold the ladder for him. In my humble view, the Respondent ought to have been careful when working alone. He should have ensured that the ladder he was using safely fixed to avoid having it slip. In the circumstances he must shoulder some blame. The Respondent should shoulder 30% liability while the Appellant should shoulder 70% liability.

8. The Appellant did not prefer an appeal against quantum hence I will not interfere with the award on quantum.

9. In the end, the appeal is found to be without merit with the exception that liability has to be apportioned as proposed

hereinabove.

10. For the avoidance of doubt, the award of ksh.184,100/= shall be

reduced by 30% i.e

General damages Ksh.184,100/=

Less 30% contribution kshs.55,230/=

Net amount ksh.128,870/=

11. The Respondent shall have costs of the appeal and the suit.

Dated, Signed and Delivered in open court this 22nd day of April, 2016

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent